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In The

Supreme Court of the United States

October Term, 1996

STATE OF SOUTH DAKOTA;
GARY VIKEN, Secretary of Revenue;

Petitioners,

v.

UNITED STATES OF AMERICA, on behalf of the Cheyenne River Sioux Tribe and its members,

and

CHEYENNE RIVER SIOUX TRIBE,

and

DEWEY COUNTY, South Dakota; JOHN ALLEY, County Treasurer; ZIEBACH COUNTY, South Dakota; VIRGINIA HERTEL, County Treasurer,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER SOUTH DAKOTA'S ONE-TIME 3% EXCISE TAX IMPOSED IN LIEU OF SALES AND USE TAXES UPON MOTOR VEHICLES "PURCHASED OR ACQUIRED FOR USE" WITHIN THE STATE, AND WHICH IS VIRTUALLY IDENTICAL TO TAXES IMPOSED UPON THE SALE OF MOTOR VEHICLES IN OTHER STATES, MAY BE APPLIED TO CHEYENNE RIVER SIOUX TRIBAL MEMBERS RESIDING ON THEIR RESERVATION WHO PURCHASE MOTOR VEHICLES OUTSIDE THEIR RESERVATION BUT WITHIN SOUTH DAKOTA?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, State of South Dakota, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled matter on January 17, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 105 F.3d 1552 (8th Cir. 1997) and is reprinted in the Appendix, App. 1-30.

The Memorandum Opinion and Order of the United States District Court for the District of South Dakota is unreported but appears in the Appendix, App. 31-48.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on January 17, 1997. The State's Petition for Rehearing and Suggestion for Rehearing En Banc were denied on May 13, 1997. App. 49-50. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

SDCL 32-5B-1.

S.D. Const. art. XI, § 8.

STATEMENT OF THE CASE

A. Procedural background.

On January 14, 1987, the Executive Committee of the Cheyenne River Sioux Tribe (hereafter "CRST" or "the

Tribe") of South Dakota adopted Resolution No. E-26-87-CR which provides in part:

> THEREFORE BE IT RESOLVED, by the Cheyenne River Sioux Tribe **that those provisions of the South Dakota Traffic Code dealing with vehicle Licensing and Driver's License be incorporated as part of the Law & Order Code of the Cheyenne River Sioux Tribe.** (Emphasis added.)

App. 51. E-26-87-CR was approved by the Council on February 4, 1987, App. 53, and was thereafter enforced by the CRST police with criminal sanctions through tribal court.[1]

On September 3, 1992, the United States, on behalf of CRST and its members, sued South Dakota and various state and county officials to enjoin collection of South Dakota's annual motor vehicle registration fee (SDCL 32-5-5) and one-time 3% excise tax (SDCL 32-5B-1) from CRST members residing on their reservation.

The annual registration fee is $20 to $40, depending on age and weight of the vehicle. The 3% excise tax is imposed "in lieu of" the general sales and use tax upon "motor vehicles purchased or acquired for use on the streets and highways." Both impositions must be paid to acquire a South Dakota motor vehicle title and license plate.

Plaintiff also sought declaratory relief and damages for annual registration fees and one-time excise taxes collected from CRST members residing on their reservation for fiscal years 1986 through the present. On August

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[1] *See also* CRST Resolution 10-90-CR, App. 54-5, adopted January 5, 1990, which directs CRST law enforcement on the proper issuance of citations for violations of E-26-87-CR.

24, 1993, the Tribe was permitted to intervene as a plaintiff, pursuant to Fed. R. Civ. P. 24(b).

During discovery, on March 7, 1994, the CRST Council enacted motor vehicle titling, registration, and licensing ordinances. At the same time, the CRST apparently abandoned the practice, since 1987, of forcing their members to license their motor vehicles pursuant to South Dakota law. The Tribe has yet to sell a license plate or register a vehicle. App 6.

The parties submitted cross motions for summary judgment. The District Court entered its decision on February 21, 1995, and held that the excise tax (SDCL 32-5B-1) was essentially a personal property tax and thus, could not be imposed on CRST members living on their reservation. App. 36. The district court concluded that the annual registration fee was a non-discriminatory fee that could validly be collected from CRST members residing on the reservation who elected to purchase state license plates. App. 38. The district court exempted from the excise tax only those CRST members living within the CRST reservation, App. 38-39, and refused to award damages. App. 40. Judgment was entered on February 23, 1995. All parties filed cross appeals.

On October 3, 1994, the Rosebud Sioux Tribe of South Dakota sued the South Dakota Secretary of Revenue in U.S. District Court to enjoin imposition of SDCL 32-5-5 and SDCL 32-5B-1 on Indians residing on both the Rosebud reservation and the checkerboarded former Rosebud Reservation areas within Mellette, Lyman, Tripp, and Gregory Counties. Secretary filed a Motion to Dismiss, and the Tribe moved for preliminary injunctive relief. The case was assigned to the same judge presiding over the Cheyenne River case. On May 23, 1995, the district court

denied the Secretary's Motion to Dismiss and granted in part, and denied in part the Rosebud Tribe's request for preliminary injunction and directed them to amend their Complaint. The Rosebud Sioux Tribe filed an interlocutory appeal from the partial denial of its Motion for Preliminary Injunction. The Rosebud Tribe and Cheyenne River Tribe cases were consolidated for appeal.

The Eighth Circuit Court of Appeals largely affirmed the district court, declaring the 3% excise tax invalid as to CRST members on the reservation, upholding the annual registration fee and affirming the denial of injunctive relief to the Rosebud Sioux Tribe; but reversed and remanded on the issue of damages for previously collected taxes.

The State petitioned for rehearing and rehearing en banc on the issue of the 3% excise tax, which was denied on May 13, 1997. No other issues were appealed.

B. Historical Background.

In 1889, Congress fixed the boundaries of a reservation for the Cheyenne River Tribe of Sioux Indians in western South Dakota. 25 Stat. 888. Later that year, South Dakota was admitted to the Union. In 1908, Congress opened 1.6 million acres of the Cheyenne River Sioux Reservation for non-Indian homesteading. Many non-Indians homesteaded in the opened lands in the early 1900's. *Solem v. Bartlett*, 465 U.S. 463 (1984). As a result, Dewey County, South Dakota, and Ziebach County, South Dakota, were organized in 1909 and 1911, respectively.[2]

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[2] *See* 1909 S.D. Laws 133; 1911 S.D. Laws 107, § 1.

The boundaries of Dewey and Ziebach Counties are virtually identical to the Cheyenne River Reservation boundaries established in 1889. App. 5.

Prior to 1900, a political force known as the Good Roads Movement began to impact all levels of government, advocating public funding of quality all-weather roads for mail delivery and general public access.[3] By 1900, most local and state governments had enacted real property taxes to finance public road projects, but the federal government had little involvement. Explosive popularity of the automobile changed all of that.[4] Good public roads became a national priority.

In 1916, Congress enacted the first federal aid highway bill, which forged a public highway partnership between states and the federal government. 39 Stat. 355. This enactment provided *first*, that the United States would fund a portion of construction costs of approved roads; *second*, states would (at their own expense) properly maintain these federally-funded roads; *third*, states would provide both construction and maintenance on the federally-funded roads, including those on public lands; and *fourth*, all roads constructed with federal aid funds would be available for free public use. Construction monies were distributed to states through a funding formula distributing one-third of funds each on state population, on land area, and on rural mail delivery route mileage. 39 Stat. 355, 357. Defects in the distribution

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[3] *U.S. Department of Transportation, America's Highways 1776 to 1976, a History of the Federal Aid Program*, Ch. 2, 36-53 (1976).

[4] Only 8,000 automobiles existed in the United States in 1900. By 1910, motor vehicles multiplied to 468,500 and jumped five-fold to 2,491,000 by 1915. *America's Highways*, 67.

formula soon became evident because, in 1916, states used property taxes to finance participation in the highway program. Many western states contained massive federal lands, including national parks, national forests, military reservations, and *Indian reservations*. Although public roads were needed on these lands, they produced no tax revenue to support public roads.[5] Congress amended the formula in 1921 by including a factor to account for the presence of "unappropriated public lands."[6] The 1921 formula modification was inadequate because:

> Many of the states have not only used state revenues to aid in the building of public roads in the states on public lands, but they have gone further, namely, through Indian reservations.

61 Cong. Rec. 7123. Representative Hayden of Arizona recognized the reality that Indian reservations created state tax revenue shortfall problems identical to other public lands. Because Arizona used both state and federal aid money to build roads within Indian reservations in Arizona, he argued there was no reason why untaxed Indian lands should be treated differently than "unappropriated public lands." The 1925 Federal Highway Act was amended to accomplish Representative Hayden's objective by inserting the words "and nontaxable Indian lands, individual and tribal" in every location after the

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[5] Philip H. Burch Jr., *Highway Revenues and Expenditure Policy in the United States*, 218 (1962).

[6] 42 Stat. 212, 214; *see also*, 61 Cong. Rec. 1468-69 (1921) (statement of Senator Pitman); *see also Senate Committee on Post Offices and Post Roads*, Rpt. 40, (May 9, 1921); *see also Burch* at 218.

words "unappropriated public lands." 43 Stat. 889, 890 (1925).

Even as Congress adjusted its funding mechanism to reflect the states' traditional reliance on real property taxes to finance road construction and maintenance, a fundamental change in highway financing was occurring, namely, the motor fuel tax. Oregon imposed the first motor fuel tax in 1919[7] and shifted the fiscal burden of support of public roads from the real property owner to the user of the service.

The Federal Aid Highway Program, funded by state and federal motor fuel taxes,[8] became a major tool to create public works during the Great Depression.[9] Congress more than tripled highway aid appropriations.[10] The federal government expanded the presence of state highway departments within Indian reservations. The National Industrial Recovery Act of 1933 appropriated 50 million dollars to state highway departments for Indian reservations and other public lands. 48 Stat. 195, 204 (1933). Under the Federal Aid Road Act. 48 Stat. 993

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[7] *City of Portland v. Kozer*, 217 P. 833, 108 Ore. 375 (1923); *see also American Highways* at 114.

[8] By 1929, 26.5 million motor vehicles generated 763.4 million dollars in motor fuel and other road user taxes which represented 99 percent of actual state expenditures on highways. *America's Highways*, at 115.

[9] During the Depression, tax revenues from the income and property taxes became almost non-existent. Gas tax revenues were, however, stable. As a result, the federal government designed much of their economic recovery policy around road construction. *America's Highways* at 123-124.

[10] Federal aid to highway appropriations in 1921 and 1927 were 75 million dollars. 42 Stat. 212, 216; 43 Stat. 889. By 1933, appropriations had risen to 400 million dollars. 48 Stat. 195-203.

(1934) appropriations of 24 million dollars and 2.5 million dollars were made for *state highway projects* on *Indian reservations* and public lands. 48 Stat. 195, 204 (1933).

In the same statute, 48 Stat. 993 (1934), Congress acted to ensure that states would allocate sufficient resources to accomplish the goals of the Federal Aid Highway Program. A problem had developed. Many states were diverting gas taxes and other motor vehicle revenues (like registration fees and excise taxes) to purposes other than road construction and maintenance. Diversion was counterproductive to economic recovery and to the beneficiaries of road-building projects.[11] Consequently, Congress legislated to discourage states from diverting motor vehicle revenues and gas taxes to non-highway projects.

> Since it is unfair and unjust to tax motor vehicle transportation unless the proceeds of such taxation are applied to the construction, improvement, or maintenance of highways, after June 30, 1935, federal aid for highway construction shall be extended only to those states that use at least the amounts now provided by law for such purposes in each state from state motor vehicles registration fees, licenses, gasoline taxes and other special taxes on motor vehicle owners and operators of all kinds for the construction, improvement, and maintenance of highways and administrative expenses in connection therewith, including the retirement of bonds for the payment of which such revenues have been pledged and for no other purposes under such

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[11] A dollar spent on direct relief supported less people than a highway construction dollar which kept eight people employed. *America's Highways* at 124.

> regulations as the Secretary of Agriculture shall promulgate from time to time.

48 Stat. 993, 995. Many states, including South Dakota, responded with constitutional amendments or statutes dedicating motor vehicle revenues and gas taxes substantially as mandated by the federal government. At the 1940 general election, Article XI, Section 8 of the South Dakota Constitution was amended to read in part:

> [T]he proceeds from the imposition of any license, registration fee, or other charge with respect to the operation of any motor vehicle upon any public highways in this state and the proceeds from the imposition of any excise tax on gasoline or other liquid motor fuel except costs of administration and except the tax imposed upon gasoline or other liquid motor fuel not used to propel a motor vehicle over or upon public highways of this state shall be used exclusively for the maintenance, construction and supervision of highways and bridges of this state.

By 1942, fourteen states had adopted similar constitutional amendments. Consequently, South Dakota's motor vehicle registration fee (SDCL 32-5-5) and excise tax (SDCL 32-5B-1) are constitutionally dedicated to "maintenance, construction, and supervision of highways and bridges" and "costs of administration" because the United States Congress has determined that "it is unfair and unjust" to do otherwise.[12]

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[12] The dedication of these revenues result in a substantial expenditure of state highway fund dollars on the CRST Reservation. In 1992, Dewey County maintained 927.6 miles, and Ziebach County maintained 761.83 miles of county rural and secondary rural roads. S.A. 84 (S.A. refers to the State Appendix in the Court of Appeals). In the same counties, the

This Court in *Solem v. Bartlett*, 465 U.S. 463 (1984) held that the surplus land statute which opened 1.6 million acres of Dewey and Ziebach Counties for non-Indian homesteading did not diminish the Cheyenne River Reservation boundaries. Consequently, Dewey and Ziebach Counties are Indian country. As a result, South Dakota has since 1984 been generally precluded from enforcing state criminal statutes against Indians within Dewey and Ziebach Counties:

> Within Indian country, state jurisdiction is limited to crimes by non-Indians against non-Indians, (cite omitted) and victimless crimes by non-Indians. Tribes exercise concurrent jurisdiction over certain minor crimes by Indians, 18 U.S.C. §§ 1152, 1153, unless the State has assumed jurisdiction under Section 1162.

South Dakota Department of Transportation (DOT) currently maintains 253.28 miles of road and the Bureau of Indian Affairs (BIA) maintains about 291.93 miles of road. Total roads under maintenance in Dewey and Ziebach Counties are 2,234.64 miles. State and local government maintain 1942.71 miles, or 86.9 percent. The balance of 291.93 or 13.1 percent is maintained by the BIA. The CRST maintains no roads. The United States provides substantial funding to South Dakota DOT (and almost every other state) for road construction through the Federal Aid Highway Program. 23 U.S.C. §§ 101 et. seq. Each state provides matching monies (usually about 20 percent) for construction but must bear the entire burden for maintenance for roads constructed through the Federal Grant In Aid Program. 23 U.S.C. § 116. In 1992, road maintenance expenses on the Cheyenne River Reservation were: Dewey County, $413,328; Ziebach County, $288,746.76; South Dakota DOT, $410,930; BIA, unknown; Cheyenne River Sioux Tribe, zero. S.A. 269, 277, 279-81.

Solem, 465 U.S. at 465 n.2. Because South Dakota enforces motor vehicle licensing statutes through criminal sanctions, the State has not, since 1984, enforced its state motor vehicle licensing statutes against Indians within the CRST Reservation. App. 5.

CRST members living on the reservation have nonetheless, since 1987, paid the South Dakota motor vehicle registration fee and the 3% excise tax because *tribal law required it*. As the Eighth Circuit Court observed:

> At one time, tribal law incorporated state traffic laws and required all motor vehicles driven on the reservation to have valid state license plates.

App. 5-6. In January 1987, the Executive Committee of the CRST Council resolved that:

> those provisions of the South Dakota Traffic Code dealing with vehicle Licensing and Driver's License be incorporated as part of the Law & Order Code of the Cheyenne River Sioux Tribe.

App. 51. Although this litigation began in September of 1992, the BIA and the Tribe continued to force CRST members to properly license their motor vehicles under South Dakota law until at least March 7, 1994, when the Tribe adopted, but failed to implement, their own motor vehicle licensing and registration system. App. 6.

C. Proceedings below.

The district court reviewed two South Dakota motor vehicle licensing statutes. First was SDCL 32-5-5, which imposes an annual licensing and registration fee for all South Dakota motor vehicles of twenty dollars to forty dollars, depending upon age and weight of the vehicle. The other statute is SDCL 32-5B-1, which reads:

> ~~In addition to~~ all other license and registration fees for the use of the highways, a person shall pay an excise tax at the rate of three percent on the purchase price of any motor vehicle, as defined by § 32-3-1, *purchased or acquired for use on the streets and highways of this state* and required to be registered under the laws of this state. *This tax shall be in lieu of any tax levied by chapters 10-45*[13] *and 10-46*[14] *on the sales of such vehicles.* Failure to pay the full amount of excise tax is a Class 1 misdemeanor. (Emphasis added.)

The district court approved the vehicle registration fee:

> South Dakota's registration or license fee is similar to the registration fee discussed in *Moe*. 425 U.S. at 469. It is a nondiscriminatory vehicle registration fee which is used solely for road and bridge purposes. *See Confederated Salish & Kootenai Tribes v. State of Montana,* 392 F.Supp. 1325, 1326, n.2 (D. Mont. 1974).

App. 38, but found that the 3% excise tax was a prohibited "personal property tax."

> South Dakota's excise tax is essentially the same type of tax as those prohibited by the United States Supreme Court. *Id.* Although South Dakota's excise tax is a one-time rather than an annual tax, it remains in essence a personal

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[13] SDCL Ch. 10-45 is South Dakota's general retail sales and service tax. The chapter imposes a tax at the rate of four percent upon retailers, measured by the gross receipts of all sales of tangible, personal property sold at retail in the state to consumers.

[14] SDCL Ch. 10-46 is South Dakota's general use tax and imposes an excise tax on the privilege of the use, storage, and consumption in this state of tangible personal property at the same rate as the sales tax.

> property tax, as it is based on a certain percentage of the purchase price or value of the vehicle. S.D.C.L. § 32-5B-1.
>
> The fact that the tax is in lieu of a sales tax does not make it lawful because it is not in fact a sales tax. It is not assessed against all persons purchasing a motor vehicle in South Dakota. *Id.* It is assessed only when a buyer seeks to obtain a South Dakota motor vehicle title. *See* S.D.C.L. § 32-5B-14.

App. 36.

The district court exempted only CRST members residing on the reservation from payment of the excise tax, and denied damages.

On appeal, the Eighth Circuit panel unanimously held that the annual registration fee at SDCL 32-5-5 is a nondiscriminatory fee, not a tax, and may be validly imposed and collected from CRST members electing to operate their motor vehicles outside their reservation. This holding was not appealed.

The circuit court also agreed with the district court that SDCL 32-5B-1 is a personal property tax and cannot be collected from CRST members residing on their own reservation. However, on this crucial point, the panel was divided. The majority rejected South Dakota's argument that SDCL 32-5B-1 is a sales and use tax specific to motor vehicles, and is valid to the extent of all South Dakota sales to CRST members which occur off reservation.

The majority made three major errors in analysis. One, it erroneously distinguished *Tunica-Biloxi Tribe v. Louisiana*, 964 F.2d 1536 (5th Cir. 1992), creating a conflict in the circuits. In *Tunica*, the Fifth Circuit considered the application of the Louisiana motor vehicle "sales at retail" tax to off-reservation but in-state motor vehicle

sales to a tribe and two tribal members, apparently living on their reservation.[15] The Tunica-Biloxi Tribe and the members paid the disputed tax (a prerequisite to registration) and sued for refunds. The Fifth Circuit denied relief, holding that the "taxable events" were the off-reservation in-state sales, and that delivery of the vehicles to or garaging the same in Indian country was irrelevant. 964 F.2d at 1541. Two, the majority misread and failed to correctly apply *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993). Three, it failed to recognize the relationship between sales and use taxes. The majority erroneously compared the motor vehicle excise tax only to South Dakota's general sales tax, failing to also examine South Dakota's use tax or motor vehicle sales and use taxes of other states.

Judge Ross dissented. He compared South Dakota's motor vehicle excise tax to motor vehicle taxing schemes in the other states in the Eighth Circuit, and concluded that:

> the excise tax and its method of collection are virtually identical to the taxes imposed upon the disposition of motor vehicles by every other state within our circuit. In all cases, the taxes operate in a similar fashion, yet are given various labels.

App. 24.

The dissent next found *Tunica-Biloxi Tribe* controlling and criticized the majority attempt to distinguish *Tunica* from the present case. The dissent compared South

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[15] *Tunica* does not state specifically that the two members were residents on their reservations, but does say that the vehicles were housed or garaged on the reservation. A vehicle purchased by the Tribe was also at issue, and the Tribe is a resident of its reservation.

Dakota's motor vehicle excise tax scheme to Louisiana's, and found operation of the Louisiana and South Dakota taxes to be virtually identical in application:

> The majority's attempt to distinguish the Louisiana tax from the South Dakota tax is simply unavailing.

App. 26. He also noted that the majority failed to recognize that South Dakota's motor vehicle excise tax is both a sales tax and a use tax, concluding:

> This is simply the use tax component of a typical sales tax scheme and in no way detracts from its characterization as a sales tax. But for the label attributed to the taxes, *Tunica* is indistinguishable from the case now before us.

App. 27.

Finally, the dissent determined that the majority misapplied *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 127 (1993), ignoring a crucial statement:

> Oklahoma's taxes are no different than those in *Moe* and *Colville*. *Like the taxes in both those cases, the excise tax and registration fee are imposed in addition to a sales tax*; (emphasis added),

and noted that South Dakota's tax is different:

> Just the opposite is true here, where South Dakota law specifically states that the excise tax "shall be in lieu of any tax levied . . . on the sales of such vehicles." S.D. Codified Laws Ann. § 32-5B-1. Unlike *Sac and Fox*, the South Dakota motor vehicle excise tax is meant to be in lieu of the state's sales tax, not to augment it.

App. 28. The State's Petition for Rehearing and Rehearing En Banc was denied on May 13, 1997.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE DIVIDED PANEL OF THE EIGHTH CIRCUIT COURT OF APPEALS SQUARELY CONFLICTS WITH *TUNICA-BILOXI TRIBE V. LOUISIANA*, 964 F.2d 1536 (5TH CIR. 1992).

Both the Fifth Circuit Court in *Tunica-Biloxi Tribe* and the Eighth Circuit Court in the case below were faced with the same question:

> Whether tribal members residing on their reservation can be required to pay a state sales tax on an automobile purchase occurring in-state but off-reservation?

The Fifth Circuit Court answered **YES**; the court below said **NO**. Thus, the decisions conflict.

The majority below attempted to distinguish *Tunica-Biloxi Tribe*, saying:

> South Dakota asserts that *Tunica-Biloxi Tribe v. Louisiana*, 964 F.2d 1536 (5th Cir. 1992), supports its claim that the excise tax is a valid sales tax, but the tax at issue in that case was different from the South Dakota excise tax.

App. 11. In support of its conclusion, the majority finds two distinctions:

> *Tunica* involved a Louisiana tax on the "sale at retail" of any item of property within the state. That tax did not apply to items purchased out of state. Purchasers from outside Louisiana could also be subject to the sales tax unlike the South Dakota tax which is not applied to out-of-state purchasers.

App. 11. and rejects the dissent suggestion that the entire tax schemes of both states should be analyzed:

> Louisiana also imposed a separate 'use tax' on the fair market value of vehicles purchased out

> of state and later brought into it. That tax was not at issue in *Tunica*, but the court indicated that its validity might have presented a different question. 964 F.2d at 1540-41.

App. 11, n.9. The court then concludes that no conflict exists:

> Since the characteristics of the South Dakota tax differ from the Louisiana tax, the outcome here is not inconsistent with *Tunica*. It is simply wrong to suggest that our decision will create a split among the circuits.

App. 11, 12 and implies that *Sac and Fox* overruled *Tunica*.

> It should also be noted that the Fifth Circuit did not have the benefit of the most recent Supreme Court guidance in this area, because *Tunica* was decided before *Sac and Fox*.

App. 12, n.10.

The majority is wrong. First the taxes in Louisiana and South Dakota, as applied to motor vehicles, are the same. Second, the supposed differences are not so in fact. Third, the majority has misapplied *Sac and Fox*. The majority erred in concluding that *Tunica* did not apply.

A. The tax at issue is identical in application to the tax upheld in *Tunica*.

The majority panel correctly observed:

> Under the teaching of Supreme Court precedent it is the nature and characteristics of the particular tax that determines whether the tax is permissible, not the nature of the label applied to it (cites omitted). This requires examination of all the attributes of the particular tax.

App. 9-10, n.8. However, the majority then lost its way.

Louisiana imposes a tax upon the retail sale of motor vehicles within the state, La.R.S. 47:302(A)(1), and a use

tax at the same rate upon motor vehicles purchased elsewhere for use in the state. La.R.S. 47:302(A)(2). South Dakota imposes an excise tax on the purchase price of any motor vehicle "purchased or acquired for use" on the highways of the state. SDCL 32-5B-1.

Collection of the motor vehicle sales and use tax in Louisiana is governed by La.R.S. § 47:303B:

> **B. Collection of tax on vehicles**. The tax imposed by R.S. 47:302(A) on the sale or use of any motor vehicle, automobile, . . . or any other vehicle subject to the vehicle registration license tax shall be collected as provided in this Subsection.
>
> (1) The tax levied by R.S. 47:302A on any such vehicle shall be paid to the vehicle commissioner as the agent of the collector of revenue at the time of application for a certificate of title or vehicle registration license and such tax shall be administered and collected by the vehicle commissioner in compliance with rules and regulations issued by the collector of revenue and in compliance with the law as construed by the collector of revenue. No certificate of title or vehicle registration license shall be issued until this tax has been paid. . . .
>
> (1) (a) The tax levied by R.S. 47:302A(1) on the sale of any such vehicle shall be due at the time of registration or any transfer of registration as required by the Vehicle Registration License Tax Law (R.S. 47:451 et seq.). . . .
>
> (b) The tax levied by R.S. 47:302A(2) on the use of any such vehicle in this state shall be due at the time first registration in this state is required by the Vehicle Registration License Tax Law (R.S. 47:451 et seq.). . . .

South Dakota collects the 3% motor vehicle excise tax in similar fashion. It is paid to the county treasurer of the owner's residence, SDCL 32-5B-10, and:

> No title may be issued or transferred for the ownership of any motor vehicle unless the tax levied by § 32-5B-1 is paid. . . .

SDCL 32-5B-14. From the taxpayer's viewpoint, the Louisiana and South Dakota motor vehicle taxes operate the same. The taxpayer who buys and licenses a vehicle in either South Dakota or Louisiana will pay the tax (excise or sales) when he registers the vehicle. If he buys out of state and licenses in either Louisiana or South Dakota, he will pay a tax (use or excise), with credit for any similar tax previously paid out of state. SDCL 32-5B-11. If he buys in state and licenses out of state (or not at all), the transaction is nontaxable in either South Dakota or Louisiana.

The conclusion that the South Dakota motor vehicle excise tax and the Louisiana motor vehicle sales and use tax are functionally identical "regardless of their labels" seems obvious.

B. The distinctions cited by the majority are not so in fact.

The distinctions cited by the majority between the South Dakota and Louisiana tax are nonexistent. First, the majority concludes that Louisiana's "tax did not apply to items purchased out of state." App. 11. It is true that sales taxes almost never apply to items purchased out of state, especially motor vehicles. But because South Dakota incorporated its motor vehicle sales and use tax into one statute, the majority unfairly ignored the use tax component of Louisiana law in its comparison. If the full Louisiana motor vehicle taxing scheme is compared to South

Dakota, the result is the same to the taxpayer. Regardless of the state of purchase, the taxpayer will pay a tax when he registers a vehicle in Louisiana, either a sales or use tax. The result is the same in South Dakota except it is called an excise tax. The name of the tax is irrelevant because "it is the nature and characteristics of the particular tax that determines whether the tax is permissible, not the nature of the label applied to it." App. 10, n.8.

Implicit in the erroneous majority analysis is the assumption that South Dakota's motor vehicle excise tax is a single component tax, and that Louisiana's is separate. In this assumption, the majority is clearly wrong. A sales tax and a use tax are opposite sides of the same coin. They are necessarily related but conceptually different taxes. They are related in that no sales tax can be effectively enforced without a complimentary use tax. A sales tax and use tax are, however, conceptually different in that each is triggered by a different taxable event. Each is an excise tax, that is, a tax on activity rather than on property. A sales tax is imposed upon the freedom of purchase and is triggered by the change of ownership within the taxing jurisdiction. The complimentary use tax presumes a transfer of ownership outside the taxing jurisdiction and is triggered by placing the item in use within the taxing jurisdiction. As this Court has observed:

> All States that impose sales taxes also impose a corollary use tax on tangible property bought out of State to protect sales tax revenues and put local retailers subject to the sales tax on a competitive parity with out-of-state retailers exempt from the sales tax.

National Geographic Society v. California Board of Equalization, 430 U.S. 551, 555 (1977). The majority simply ignored this reality.

The other "distinction" noted by the majority is: "Purchasers from outside Louisiana could also be subject to the sales tax. . . . " App. 11. This is simply an incorrect statement of Louisiana sales tax law on motor vehicles, because the tax is collected at the time of registration. La. R.S. § 47.303B The *Tunica* court noted:

> the only way in which the state can collect its sales tax on vehicles sold within the state is to refuse to issue a license plate to a vehicle owner who has not paid the tax. When a vehicle is not used on the highways of Louisiana, there is no need for a license plate to be issued.

964 F.2d at 1541 n.14.

In fact, a purchaser of a motor vehicle in either Louisiana or South Dakota, who is from out of state, will not pay the in-state motor vehicle tax unless he applies for a license plate or registration. This supposed distinction is non-existent. As the dissent clearly stated:

> The majority's attempt to distinguish the Louisiana tax from the South Dakota tax is simply unavailing. . . . But for the label attributed to the taxes, *Tunica* is indistinguishable from the case now before us.

App. 26-7.

II

BECAUSE THE DECISION BELOW IS DISTINGUISHABLE FROM *SAC AND FOX*, THE CONFLICT WITH *TUNICA* IS NOT RESOLVED.

The majority implication at App. 11, n.10, that *Tunica* was overruled by *Sac and Fox* was reached by misreading *Sac and Fox*.

Careful reading of both the Tenth Circuit Court and Supreme Court opinions in *Sac and Fox* disclose several

distinctions from the instant case which preclude the Eighth Circuit reliance upon *Sac and Fox* as controlling authority. Among those distinctions are first:

> Like the vehicle excise tax, *see* Tit. 68, § 2102, the vehicle registration fees are to provide funds for 'general governmental functions,' Tit. 47, § 1103.

508 U.S. at 119. The revenue from South Dakota's motor vehicle excise tax is not general government revenue, but rather, is constitutionally dedicated to the State Highway Fund, pursuant to federal government mandate as we describe above. See discussion at 5-9, supra.

Second, the *Sac and Fox* Tribe had in place an operational motor vehicle title, license, and tax scheme, which apparently enjoyed de facto recognition by the Oklahoma Tax Commission.

> Oklahoma considers all tribal members who register their vehicles with the Sac and Fox Nation (and hence do not pay state excise and registration taxes) to be delinquent with regard to the state taxes. *Nevertheless, so long as a tribal member retains ownership of a vehicle, the State makes no effort to collect the allegedly delinquent taxes.* (Emphasis added.)

508 U.S. at 119, 120. By contrast, the CRST required their membership to buy South Dakota plates from 1987 until March 1994, and have yet to implement their own system.

The third distinction is crucial.

> Oklahoma's taxes are no different than those in *Moe* and *Colville. Like the taxes in both those cases, the excise tax and registration fee are imposed in addition to a sales tax.* . . . (Emphasis added.)

508 U.S. at 127. Oklahoma's sales tax argument was rejected largely because this Court found that Oklahoma already imposed a sales tax on the purchase of vehicles.

The Court was in effect being asked to approve a second sales tax on the vehicle, which it would not do.[16] South Dakota does not make a dual imposition. SDCL 32-5B-1 imposes the motor vehicle excise tax *in lieu of the sales and use tax*. This distinction alone should be reason for granting certiorari and reversing the Eighth Circuit.

The most fundamental distinction, however, was the discriminatory treatment accorded *Sac and Fox* members by the Oklahoma Tax Commission; which treatment compelled both the Tenth Circuit Court and this Court to conclude that Oklahoma's motor vehicle excise tax was "as applied to *Sac and Fox* purchasers" a "property tax." The Supreme Court noted:

> Nevertheless, so long as a tribal member retains ownership of a vehicle, the State makes no effort to collect the allegedly delinquent taxes. If the tribal member sells the car to a nonmember, however, and the nonmember then "applies to the State for a title and license plate, the subsequent owner must bring up the title on the vehicle by paying the current and delinquent excise taxes on the transfers of the vehicle." App. 29. The subsequent owner also must pay registration fees for the current year and registration fees and penalties for one previous year.

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[16] Although Montana, (Mont. Code Ann. § 61-3-502 (1995)), and Washington (Wash. Rev. Code Ann. § 82.08.020 (1993); § 82.12.020 (1996); § 82.12.045 (1997)), both did impose a sales tax on motor vehicles in addition to those at issue in *Moe* and *Colville*, this writer has been unable to locate the additional Oklahoma motor vehicle sales tax referred to at 508 U.S. at 127.

Because the additional Oklahoma motor vehicle sales tax appeared to influence the decision in *Sac and Fox*, review of this case would give the court the opportunity to clarify this portion of the *Sac and Fox* holding.

> *Ibid.* In contrast, the Commission issues transfer titles to vehicles previously licensed in other States upon payment of current registration fees without more. Okla. Stat., Tit. 68, § 2105(b) (Supp. 1990).

508 U.S. at 120. The Tenth Circuit Court of Appeals found the Oklahoma excise tax was applied to *Sac and Fox* purchasers as a property tax:

> Although the State does not impose such motor vehicle taxes on tribal members directly, *requiring nonmember purchasers to pay back taxes on tribally tagged vehicles burdens tribal members by diminishing the fair market value of their automobiles upon sale.* (Emphasis added.)

Sac and Fox Nation v. Oklahoma Tax Commission, 967 F.2d 1425, 1430 (10th Cir. 1992). This Court adopted the Tenth Circuit's analysis:

> The Court of Appeals found that the vehicle excise tax 'is not enforced as a sales tax against *Sac and Fox* purchasers.' 967 F.2d, at 1430. . . .

508 U.S. at 126.

No such disparate treatment of CRST members exists in South Dakota. The accumulation of penalties, diminished market value of tribal member vehicles, and the resulting property tax implications noted by the Tenth Circuit Court do not exist in South Dakota. *Sac and Fox* should be limited to its own unique facts, and should not be read to convert every motor vehicle tax in the United States into a property tax.

III

THE MAJORITY FAILED TO RECOGNIZE THE RELATIONSHIP BETWEEN SALES AND USE TAXES IN ERRONEOUSLY CONCLUDING THAT SOUTH DAKOTA'S 3% EXCISE TAX IS A "PERSONAL PROPERTY TAX."

As previously noted, the majority failed to recognize that sales and use taxes are necessary compliments to each other, thus resulting in their erroneous analysis of *Tunica*. This failure also appears in the majority analysis of South Dakota's excise tax.

The majority made five findings in concluding that South Dakota's excise tax is, in reality, a property tax. In each instance, the majority compared the excise tax with South Dakota's general sales tax, but failed to consider the state's complimentary use tax or the general characteristics of sales and use taxes. In reality, each finding demonstrates simply a component part of a typical sales/use tax scheme.

> Finding One:
> Unlike the state sales tax, the excise tax is not imposed on the retailer or at the time of sale.

App. 9. The statement is accurate but misleading. South Dakota's general sales tax is collected by the retailer. Motor vehicle sales and use taxes are almost universally collected by the entity which issues the title and license plates. The point of collection is irrelevant. The relevant fact is that the sales and use tax is specific to motor vehicles and should be so analyzed. In *Williams and Levine v. Vermont*, 472 U.S. 14 (1985), this Court considered an equal protection challenge to the Vermont motor vehicle taxing scheme:

> The Vermont Motor Vehicle Purchase and Use Tax, Vt Stat Ann, Tit 32, ch 219 (1981), is distinct

> from the State's general sales and use taxes. It is intended to 'improve and maintain the state and interstate highway systems, to pay the principal and interest on bonds issued for the improvement and maintenance of those systems and to pay the cost of administering this chapter.' § 8901. The revenue from the tax goes into a distinct "transportation fund." § 8912. The tax is of two sorts: a four-percent sales tax is imposed at the time of purchase of a motor vehicle in Vermont by a Vermont resident, § 8903(a), and a four-percent use tax is imposed upon registration of a motor vehicle in Vermont unless the Vermont sales tax was paid, § 8903(b).

472 U.S. at 18 (footnotes omitted). This Court recognized that in Vermont, at least, a motor vehicle purchase and use tax can co-exist with a general sales and use tax, even though the revenue is dedicated to a transportation fund. The Eighth Circuit Court, however, found that a separate motor vehicle specific sales and use tax was really a personal property tax.

> Finding Two:
>
> Nor is the excise tax revenue credited to the general revenue fund.

App. 10. Again, the statement is true but without explanation as to why dedication of revenue is a property tax characteristic. In fact, the revenue was constitutionally dedicated in South Dakota in 1940 as a result of a federal mandate. *See* Discussion at 5-9, *supra*. In *Sac and Fox*, this Court held invalid taxes which "provide funds for 'general governmental functions.' " 508 U.S. at 119. Likewise, this Court in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), struck down taxes which provided revenues for "general

governmental functions,"[17] suggesting that general revenue (not dedicated) is a property tax characteristic.

> Finding Three:
>
> Although the amount of the tax is based on the 'purchase price,' that term is defined to include either the actual consideration paid or the actual value of the vehicle.

App. 10. The statement is correct, but describes a typical sales and use tax scheme. Sales tax is imposed upon the sale price. Use tax is imposed on market value. The majority fails to recognize this typical sales and use tax characteristic. It also fails to recognize that without such a provision, taxpayers could easily evade the tax by stating the consideration as nominal or a gift. The provision discourages fraud by the taxpayer.

> Finding Four:
>
> The excise tax does not operate like a sales tax. . . . For example, the tax does not apply to all motor vehicle sales in the state, but only to those resulting in ownership by a South Dakota resident. The tax is not paid unless the owner applies for the issue or transfer of South Dakota title. § 32-5B-14. Conversely, the excise tax does apply to vehicles purchased out of state by South Dakota residents.

App. 10-11. The quote demonstrates the inability of the majority panel to distinguish between sales and use taxes. Not surprisingly, the same mistake was made by the plaintiffs in *Tunica*, as the Fifth Circuit Court found.

> The plaintiffs, however, confuse the jurisprudence interpreting the state's use tax with that interpreting the sales tax.

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[17] See *Moe v. Confederated Salish and Kootenai Tribes*, 392 F. Supp. 1297, 1326 (D. Mont. 1975); see also West's RCWA 82. 44.110 (1979).

964 F.2d at 1540. The in-state sale to a resident is a sales tax transaction approved in *Tunica*. The out-of-state purchase by a South Dakota resident is nontaxable until the vehicle is placed in service in South Dakota, and is then subject to the use tax. The Fifth Circuit Court recognized this distinction. The majority should have followed the Fifth Circuit.

> Finding Five:
> Moreover, the tax applies to motor vehicles that are being newly brought into the state but have not recently been purchased. A person moving to South Dakota and applying for a state motor vehicle title is taxed at a percentage of the retail value of the vehicle on the day it enters the state, unless the owner provides sufficient proof that the vehicle was subject to an equal or greater tax in another state. § 32-5B-11.

App. 11. This statement misses three points. First, it describes a typical use tax, which South Dakota and Louisiana, impose with a credit to the extent of any sales tax paid in the state of origin. *See* La.R.S. 47:303(A). *See also* SDCL 32-5B-11. Second, the description is typical of how South Dakota (and many other states) would treat a printing press or farm tractor brought into the state, but not recently purchased. A use tax would be imposed at market value with credit given for any sales tax previously paid on the printing press or tractor in another state. *See* SDCL 10-46-6.1. Third, South Dakota is asking only what *Tunica* allows, that is, the right to collect the tax for off-reservation South Dakota sales.

The majority, time after time, fails to comprehend that South Dakota's excise tax is a sales and use tax combined in one statute, and should be analyzed accordingly. Had they done so, the result would have been different.

IV

THE ERRONEOUS EIGHTH CIRCUIT HOLDING HAS POTENTIAL NATIONAL IMPACT.

The dissent examined the motor vehicle taxation practices of every state in the Eighth Circuit and concluded that those taxing schemes function the same as in South Dakota. App. 24-6. If the dissent is correct in this observation, the erroneous decision below, if left to stand, could have impact well beyond South Dakota.

As the dissent points out:

> By failing to recognize the similarities between Louisiana and South Dakota's taxing schemes, the majority now creates a split among the circuits with regard to the validity of taxing the off-reservation sales of motor vehicles. Further, by failing to recognize the distinct method of collecting motor vehicle sales taxes, as opposed to other retail sales taxes, by every state in our circuit and possibly the majority of states across this country, our court today takes a step toward a blanket invalidation of sales taxes on the off-reservation purchases of motor vehicles. This clearly intrudes upon the Supreme Court's affirmation that "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State," including its state tax laws. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-9 (1973).

App. 29-30.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 95-2529
95-2535
95-2720

United States of America, on behalf of the Cheyenne River Sioux Tribe and its members,

Plaintiff/Appellant/Cross Appellee,

Cheyenne River Sioux Tribe,

Intervenor Plaintiff/Appellant/Cross Appellee,

v.

State of South Dakota; Julie M. Johnson, State Secretary of Revenue,

Defendants/Appellees/Cross Appellants,

Ronald J. Schreiner; Dewey County, South Dakota; John Alley, County Treasurer; Ziebach County, South Dakota; Virginia Hertel, County Treasurer,

Defendants/Appellees.

* Appeals from the
* United States District
* Court for the District
* of South Dakota

No. 95-2688

Rosebud Sioux Tribe,

Plaintiff/Appellant,

v.

Julie Johnson, State Secretary of Revenue,

Defendant/Appellee.

United States of America,

Amicus Curiae.

Submitted: May 16, 1996

Filed: January 17, 1997

Before MURPHY and ROSS, Circuit Judges, and VAN SICKLE,* District Judge.

MURPHY, Circuit Judge.

These two cases challenge the jurisdiction of the State of South Dakota to impose its motor vehicle excise tax and registration fee on Indians who live within the

* The HONORABLE BRUCE M. VAN SICKLE, United States District Judge for the District of North Dakota, sitting by designation.

boundaries of a reservation. In one case, the United States sued for declarative, injunctive, and compensatory relief on behalf of the Cheyenne River Sioux Tribe and its members. The second case involves claims brought by the Rosebud Sioux Tribe for equitable relief.

South Dakota Codified Laws section 32-5B-1 provides that residents shall pay an excise tax on the value of any motor vehicle purchased or acquired for use in the state and required to be registered. S.D. Codified Laws Ann. § 32-5B-1.[1] The excise tax is a one time assessment collected by the county in which the owner resides when the vehicle is first licensed in the state. *Id.* § 32-5B-10. Payment of the excise tax is required for the issuance or transfer of state vehicle title, *id.* § 32-5B-14, and is thus a condition precedent to registration and issuance of state license plates.[2] The proceeds are allocated to the state highway fund. *Id.* § 32-5B-17. Failure to pay the excise tax is a misdemeanor. § 35-5B-1.

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[1] The statute provides:

In addition to all other license and registration fees for the use of the highways, a person shall pay an excise tax at the rate of three percent on the purchase price of any motor vehicle . . . purchased or acquired for use on the streets and highways of this state and required to be registered under the laws of this state. This tax shall be in lieu of any tax levied by chapters 10-45 and 10-46 on the sales of such vehicles. Failure to pay the full amount of excise tax is a Class 1 misdemeanor.

S.D. Codified Laws Ann. § 32-5B-1.

[2] The issuance or transfer of a certificate of title also requires payment of a $5 fee, which is not challenged by the parties in this case.

South Dakota Codified Laws section 32-5-5 imposes a separate motor vehicle registration fee on state residents. S.D. Codified Laws Ann. § 32-5-5.[3] The annual fee is based on the weight of the vehicle and ranges from $20 to $40 for average noncommercial vehicles. It is collected at the time the owner obtains license plates or renewal tags, and is a condition precedent for their issuance. *Id.* A percentage of the collected fees goes toward administrative costs, and the remainder is allocated to various road funds. Failure to pay the registration fee is a misdemeanor. § 32-5-2.4.

I.

The Cheyenne River Sioux Tribe is a federally recognized Indian tribe. In 1868 the Fort Laramie Treaty, 15 Stat. 635, established the Great Sioux Reservation for the use and occupancy of the Sioux Nation. Congress later created the Cheyenne River Indian Reservation in 1889 on

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[3] The statute provides:

> Subject to the provisions of §§ 32-5-17 to 32-5-45, inclusive, license fees and compensation for use of the highways, fees shall be based, except as otherwise specifically provided, upon manufacturers' weights, including accessories. If a noncommercial motor vehicle is an automobile, pickup truck or van with a manufacturer's shipping weight, including accessories, of six thousand pounds or less, the license fees for such a motor vehicle shall be as provided by § 32-5-6 . . . These fees shall be paid annually to the county treasurer, and shall be as provided by this chapter.

S.D. Codified Laws Ann. § 32-5-5.

part of the treaty land as a separate reservation for the Cheyenne River Sioux Tribe. *See South Dakota v. Bourland*, 508 U.S. 679 (1993). In 1908 Congress opened a significant portion of the reservation to non-Indian settlement, but this did not diminish the reservation. *See Solem v. Bartlett*, 465 U.S. 463 (1984). The reservation wholly encompasses Dewey and Ziebach counties in the State of South Dakota. Its residents include tribal members, nonmember Indians, and non-Indians.

The tribe believes that all Indians residing on the Cheyenne River Indian Reservation are immune from state taxation of their motor vehicles, including both the excise tax and the annual registration fee. The tribal council has consistently maintained that the state lacks authority to collect the excise tax and registration fee from tribal members,[4] and there is evidence in the record that at least some members have paid the excise tax and registration fee under protest.

The statutes do not create an exemption for Indian-owned vehicles that are driven exclusively on reservation land, but the state apparently does not enforce its motor vehicle registration laws in such circumstances. The owner of any vehicle driven outside the reservation is subject to criminal penalties for improper registration, however. At one time, tribal law incorporated state traffic

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[4] Motor vehicles owned by the tribe itself are statutorily exempt from the state excise tax and registration fee, and license plates are issued for a fee based on actual administrative costs. S.D. Codified Laws Ann. § 32-5-42 (registration fee); *id.* § 32-5B-2(1) (excise tax).

laws and required all motor vehicles driven on the reservation to have valid state license plates. In 1994 the tribe enacted its own motor vehicle registration system, but has not yet implemented it to avoid imposing double fees on reservation residents.

On September 3, 1992 the United States brought suit on behalf of the Cheyenne River Sioux Tribe and its members, seeking a declaration that the state lacks jurisdiction to impose its motor vehicle excise tax and registration fee on Indians residing on the Cheyenne River reservation.[5] It also sought an injunction against the collection of the fees and taxes, and monetary damages in the amount of taxes paid between 1986 and the present. On August 24, 1993, the Cheyenne River Sioux Tribe was permitted to intervene as a plaintiff pursuant to Federal Rule of Civil Procedure 24(b).

In February 1995 the district court[6] ruled on cross motions for summary judgment. It held that the excise tax was essentially a personal property tax and thus could not be imposed on tribal members living on the reservation. *See Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 127-28 (1993). It viewed the annual registration fee differently, concluding that it was a nondiscriminatory fee that could validly be collected from tribal members residing on the reservation who elected to purchase state license plates. The district court did not extend

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[5] The suit named as defendants the State of South Dakota and its Secretary of Revenue, as well as two counties and the county treasurers.

[6] The Honorable John B. Jones, United States District Judge for the District of South Dakota.

immunity from the excise tax to nonmember Indians and did not award damages to tribal members. Judgment was entered on February 23, 1995, and the parties filed cross appeals.

The United States and the tribe argue that the registration fee operates as a tax and thus cannot be imposed on reservation Indians. They also claim that monetary damages should be awarded for taxes previously paid. The tribe also argues that tax immunity should be extended to nonmember Indians residing on the Cheyenne River reservation. South Dakota responds that the district court correctly determined the registration fee to be valid, denied monetary damages, and held that nonmember Indians were not immune from taxation. It argues on cross appeal that the excise tax is a valid sales and use tax.

A.

As a general rule, a state lacks jurisdiction to tax the lands, activities, and property of tribal members " 'within the boundaries of the reservation,' " unless there has been a " 'cession of jurisdiction or other federal statutes permitting it.' " *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)). In other words, a tribal member's on-reservation activities are immune from state taxation absent express congressional authorization of the tax. *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 171 (1973). This is because a state's authority to tax on-reservation activities is limited or

preempted by the terms of treaties which set aside reservations for the exclusive use of Indian tribes and by various federal statutes defining the limits of state power. *Id.*[7] The doctrine of Indian sovereignty reflects the " 'deeply rooted' " historical policy of " 'leaving Indians free from state jurisdiction and control.' " *Id.* at 168 (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)). That doctrine "provides a backdrop against which the applicable treaties and statutes must be read." *Id.* at 172.

Congress has not specifically authorized the taxation of a tribal member's personal property, and South Dakota thus lacks jurisdiction to impose such a tax. This would include any tax or fee that operates as a personal property tax on motor vehicles owned by tribal members living on the reservation. *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 127-28 (1993); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 163 (1980); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 480-81 (1976).

The general rule of tax immunity applies to activities that occur on the reservation, including ownership of property, but "different considerations" apply to off-reservation activities. *Mescalero*, 411 U.S. at 148. Indians who go beyond reservation boundaries are generally "held subject to nondiscriminatory state law otherwise applicable to all citizens." *Id.* at 148-49. This reasoning suggests that states may impose on tribal members a sales

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[7] The analysis in *McClanahan* relies on the language in a treaty with the Navajo. South Dakota does not claim that the analysis should be different in this case or argue that it has jurisdiction to tax on-reservation activities or property.

tax or other nondiscriminatory tax on off-reservation purchases. *See Tunica-Biloxi Tribe v. Louisiana*, 964 F.2d 1536 (5th Cir. 1992).

The parties do not disagree about the general rule of tax immunity for tribal members within the boundaries of a reservation or the authority of the state to tax off-reservation sales transactions. South Dakota admits that it would lack authority to impose state property taxes on members of the Cheyenne River Sioux Tribe living on the reservation, and the tribe concedes that its members could validly be required to pay a sales tax on off-reservation purchases, a properly limited state road use tax, or certain non-discriminatory fees. The dispute here is one of classification: what sort of tax or fee is created by these statutes?

South Dakota argues that the excise tax is a sales tax on off-reservation purchases of motor vehicles. The statute itself speaks of levying an excise tax, "in lieu of" any sales or use tax, on the value of any motor vehicle "purchased or acquired for use" in the state. § 32-5B-1. Unlike the state sales tax, the excise tax is not imposed on the retailer or at the time of sale.[8] *Compare* S.D. Codified

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[8] The dissent attempts to make too much of the mention of the fact that the South Dakota excise tax is not collected by the retailer at the time of sale. This is but one of the facts that make up the total circumstances showing that the excise tax is a tax on personal property rather than a sales tax. The tax only applies to certain types of vehicles sales in South Dakota. It also applies to vehicles purchased by South Dakota residents outside of the state and to certain vehicles not recently purchased, but recently brought into the state. Furthermore, it arises on application for title, rather than on vehicle sale.

Laws Ann. §§ 10-45-2 (retail sales tax) *with* § 32-5B-10 (excise tax). Nor is the excise tax revenue credited to the general revenue fund. *Compare* S.D. Codified Laws Ann. § 10-46-48 *with* § 32-5B-17. Although the amount of the tax is based on the "purchase price," that term is defined to include either the actual consideration paid or the actual value of the vehicle. *See* S.D. Codified Laws Ann. §§ 32-5B-4(3)-(5), 32-5B-11.

The excise tax does not operate like a sales tax. It might resemble a sales tax in some cases, such as when a new or used car is purchased from a licensed dealer in South Dakota and registered there by the new owner. In other circumstances, however, the tax more obviously relates to the ownership of the vehicle as property rather than the sales transaction itself. For example, the tax does not apply to all motor vehicle sales in the state, but only

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Under the teaching of Supreme Court precedent it is the nature and characteristics of the particular tax that determines whether the tax is permissible, not the nature of the label applied to it. *Sac and Fox*, 508 U.S. at 127-28; *Colville*, 447 U.S. at 163. This requires examination of all the attributes of the particular tax. The dissent ignores this principle and selects only certain factors to analyze.

The dissent also has done its own survey of taxes in other states in the circuit and concludes that they show some similarities to the South Dakota excise tax. There is no information about whether any of these states have attempted to apply the taxes to on-reservation Indians, and if so, what the result has been. This discussion of other state taxes is not based on the record before the court, and the parties have had no occasion to address the possible relevance or irrelevance of the dissent's speculation about other state laws and its invitation for additional litigation.

to those resulting in ownership by a South Dakota resident. The tax is not paid unless the owner applies for the issue or transfer of South Dakota title. § 32-5B-14. Conversely, the excise tax does apply to vehicles purchased out of state by South Dakota residents. Moreover, the tax applies to motor vehicles that are being newly brought into the state, but have not recently been purchased. A person moving to South Dakota and applying for a state motor vehicle title is taxed at a percentage of the retail value of the vehicle on the day it enters the state, unless the owner provides sufficient proof that the vehicle was subject to an equal or greater tax in another state. § 32-5B-11.

South Dakota asserts that *Tunica-Biloxi Tribe v. Louisiana*, 964 F.2d 1536 (5th Cir. 1992), supports its claim that the excise tax is a valid sales tax, but the tax at issue in that case was different from the South Dakota excise tax. *Tunica* involved a Louisiana tax on the "sale at retail" of any item of property within the state. That tax did not apply to items purchased out of state.[9] Purchasers from outside Louisiana could also be subject to the sales tax unlike the South Dakota tax which is not applied to out-of-state purchasers. Since the characteristics of the South Dakota tax differ from the Louisiana tax, the outcome here is not inconsistent with *Tunica*. It is simply wrong to

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[9] Louisiana also imposed a separate "use tax" on the fair market value of vehicles purchased out of state and later brought into it. That tax was not at issue in *Tunica*, but the court indicated that its validity might have presented a different question. 964 F.2d at 1540-41.

suggest that our decision will create a split among the circuits.[10]

The South Dakota excise tax resembles the personal property taxes found to be preempted in *Moe*, *Colville*, and *Sac and Fox*. *Colville* involved a Washington "excise tax" which was assessed annually at a percentage of a motor vehicle's value for the "privilege" of using a motor vehicle in the state. 447 U.S. at 162. The Supreme Court held that the tax was similar in all but name to the personal property tax on motor vehicles that had been invalidated as applied to tribal members in *Moe*, 425 U.S. at 480-81. *Colville*, 447 U.S. at 163. Similarly, in *Sac and Fox*, the Supreme Court held that Oklahoma's motor vehicle excise tax and its yearly vehicle registration fee operated as personal property taxes and thus could not be imposed on tribal members living on the reservation. 508 U.S. at 127-28. The South Dakota tax is not identical to the taxes in *Moe*, *Colville*, and *Sac and Fox*, but it has important similarities. Like them, the South Dakota tax is applied to motor vehicle owners, rather than simply to purchasers, and is based on a percentage of the value of the motor vehicle. *Sac and Fox*, 508 U.S. at 119; *Colville*, 447 U.S. at 163 (discussing *Moe*). It is true that this tax is not applied annually, but neither was the tax found invalid in *Sac and Fox*.[11] *Sac and Fox*, 508 U.S. at 126.

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[10] It should also be noted that the Fifth Circuit did not have the benefit of the most recent Supreme Court guidance in this area, because *Tunica* was decided before *Sac and Fox*.

[11] Contrary to the dissent's implication in its discussion of *Moe* and *Colville*, *Sac and Fox* indicates that a state without authority to impose an annual tax has no more authority to impose a one-time tax.

The South Dakota excise tax essentially operates as a tax on the ownership of a motor vehicle, rather than as a tax on off-reservation sales transactions. The ownership of a vehicle is the sort of on-reservation activity that a state is not permitted to tax without express Congressional authorization. *See Sac and Fox*, 508 U.S. at 127. The district court did not err in ruling that the state lacks jurisdiction to impose the excise tax on tribal members residing on the reservation.

B.

The United States and the Cheyenne River Sioux Tribe argue that the state similarly lacks jurisdiction to impose its annual registration fee on reservation Indians because it operates to tax on-reservation activities. South Dakota responds that it has authority to impose the fee because it is a nondiscriminatory fee for off-reservation activities. The issue is again one of classification.

The United States and the tribe claim that the fee actually operates as a tax on the ownership of vehicles and is therefore preempted under *Sac and Fox*, *Colville*, and *Moe*. In *Sac and Fox* the Court held Washington's annual registration fee to be invalid as applied to reservation Indians, but that fee was based on the value of a vehicle and thus was like a personal property tax. *Id.* at 127-28. It was found to be no different from the taxes held preempted in *Moe* and *Colville*. South Dakota's registration fee does not resemble a property tax, however. It is not based on the value of the vehicle, but is a flat fee based on weight, and any proceeds resulting from it are dedicated to highway purposes.

The United States and the tribe also suggest that the fee is a tax on the use of state roads. They concede that a state might have jurisdiction to impose a tax on reservation Indians for the use of off-reservation roads, but argue that the fee here is not "tailored to the actual amount of off-reservation use" as required by *Colville*, 447 U.S. at 163-64.

In *Colville*, the Supreme Court rejected the State of Washington's claim that its excise tax was actually a tax on the use of the vehicle within the state. It held that the tax effectively functioned as a personal property tax, which had previously been held invalid as applied to tribal members in *Moe*:

> We do not think *Moe* and *McClanahan* can be this easily circumvented. While Washington may well be free to levy a tax on the use outside the reservation of Indian-owned vehicles, it may not under that rubric accomplish what *Moe* held was prohibited. Had Washington tailored its tax to the amount of actual off-reservation use, or otherwise varied something more than mere nomenclature, this might be a different case.

Id. There is no suggestion in the South Dakota statute that the purpose of the fee is to tax the use of the state roads. Even if it were, the tax is significantly different from a property tax so that the concerns expressed in *Colville* are avoided.

The registration fee is a nondiscriminatory fee for the registration of a vehicle in the state and the issuance of state license plates. *See Moe*, 425 U.S. at 469 (Montana fee required for registration and issuance of state license

plates could be imposed on reservation Indians).[12] It is not collected from owners of motor vehicles that are not registered with the state, including those driven exclusively within the boundaries of the reservation. The concerns related to state taxation of on-reservation activities are not present here because the fee is not based on any on-reservation activity. Accordingly, the district court did not err in ruling that Indians who elect to purchase South Dakota license plates or renewal tags can be required to pay the annual registration fee.

C.

The Cheyenne River Sioux Tribe argues that immunity from the excise tax should not be limited to tribal members but should extend to nonmember Indians residing on the reservation. South Dakota responds that the interests of nonmember Indians have not been properly raised, and argues that nonmember Indians are subject to state taxation because they have the same status as non-Indians.

The state's power to tax nonmember Indians is not directly raised by this action, because no nonmember Indians are parties to this case. The United States initiated the action "on behalf of the Cheyenne River Sioux Tribe and its members," and the tribe intervened "to

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[12] Montana's registration fee was not challenged by the tribe in *Moe*, but the Court's analysis suggests a basis to differentiate between a registration fee that could be imposed on reservation Indians and a personal property tax that could not.

protect its sovereign right to raise revenue to finance its state government. . . . "

Even if the issue had been properly presented, the arguments made are not convincing. As discussed above, the tax immunity of reservation Indians is premised on the preemption of state laws by treaty and statute and informed by notions of tribal self government. These reasons underlying immunity do not have the same force as applied to Indians who are not members of the governing tribe.[13] *See Colville*, 447 U.S. at 160-61 (retail sales tax immunity for on-reservation sales does not extend to nonmember Indians residing on reservation).

The tribe argues that the interest in tribal self government extends to nonmember Indians because Congress has defined tribal self government to include all Indians. Although Congress has defined tribal powers of self government to include criminal jurisdiction over "all Indians," 25 U.S.C. § 1301, there is no question that South Dakota retains civil regulatory jurisdiction over nonmember Indians in the same way that it does over non-Indians on the reservation. *See id.*

The tribe also asserts that the terms of the 1868 treaty creating the Great Sioux Reservation establishes that nonmember Indians have an interest in tribal self government. It points to language setting aside land for the use

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[13] The tribe argues that state taxation of nonmembers is preempted by the comprehensive federal Indian country road system, but the statutes and regulations implementing that system do not demonstrate a Congressional intent to exempt nonmember Indians from state taxation. *See Colville*, 447 U.S. at 161.

of the Sioux Nation and "for such other friendly tribes or individual Indians as from time to time they may be willing . . . to admit amongst them." Art. 2. (15 Stat. 653). Nonmember Indians living on the reservation are not in fact involved in tribal self government, however. The Cheyenne River Sioux Tribe's constitution and bylaws do not allow nonmember Indians to vote in tribal elections or hold office on the reservation.

The tribe also argues that at a minimum any Sioux Indian residing on its reservation should be immune from taxation because all Sioux are part of the Sioux Nation. The Great Sioux Reservation was divided into separate reservations for various Sioux tribes, including the Cheyenne River Sioux. Although the different Sioux tribes share common ties, they exist as separate entities with their own constitutions and governing structures. Nonmember Sioux residing on the Cheyenne River reservation are not allowed to vote or hold office, and are not actually constituents of the governing tribe.

D.

The United States and the tribe argue that monetary damages should be awarded to compensate for past payments of the excise taxes by tribal members.[14] The district court rejected the claim for damages because previous cases addressing motor vehicle taxation had not been

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[14] They actually seek damages for payments by all reservation Indians of both the excise tax and the registration fee, but the claims of nonmembers and those claims based on the registration fee are foreclosed for the reasons already discussed.

applied retroactively. South Dakota offers several alternative rationales for denying monetary relief.

The district court correctly noted that the opinions in *Moe, Colville,* and *Sac and Fox* did not grant retroactive relief, but those cases did not involve claims for monetary damages. Rather they were claims for declaratory and injunctive relief. When a state tax is declared to be invalid either "because . . . it [is] beyond the State's power to impose" or "because the taxpayers were absolutely immune from the tax," the State must " 'undo' the unlawful deprivation by refunding the tax previously paid under duress." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco,* 496 U.S. 18, 39 (1990) (citing *Ward v. Love County Board of Comm'rs,* 253 U.S. 17, 24 (1920)). In other words, the holding in such cases would be applied retroactively.

The state claims that a damage award is barred by the Eleventh Amendment. It cites *Blatchford v. Native Village of Noatak,* 501 U.S. 775 (1991), in which the Supreme Court held that the Eleventh Amendment would bar damage claims brought by Indian tribes against a state.[15] The Eleventh Amendment does not bar suits brought by

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[15] *Blatchford* distinguished its facts from those in *Moe* where there was federal jurisdiction over a state tax injunction action brought by an Indian tribe. *Blatchford* suggested that such actions do not implicate the Eleventh Amendment when brought against state officers rather than the state itself. 501 U.S. at 785 n. 3. (*Moe* held that the Tax Injunction Act, 28 U.S.C. § 1341, did not deprive federal courts of jurisdiction over tax injunction claims brought by Indian tribes, because Congress had separately provided for jurisdiction over tribal claims in 28 U.S.C. § 1362. 425 U.S. at 472-75).

the United States on behalf of Indian tribes or their members, however. *United States v. Minnesota*, 270 U.S. 181, 195 (1926); *United States v. Board of Comm'rs of Osage County*, 251 U.S. 128, 133 (1919). The *Blatchford* Court recognized that the tribal claims would not have been barred if brought by the United States, but held that tribal access to federal court was not as broad. *Blatchford*, 501 U.S. at 783-84. The Eleventh Amendment does not apply in the Cheyenne River case because the United States brought the action.

The state also argues that damages should be denied because payment of the taxes was required by tribal law and thus was not coerced by the state. A 1987 resolution incorporated into tribal law certain provisions of the South Dakota Traffic Code, including the requirement that vehicles bear valid state license plates. Neither that resolution nor a clarifying resolution passed in 1990 addressed the payment of the state excise tax or suggested that its collection from tribal members was valid. The tribal council has consistently protested the imposition of state motor vehicle taxes on its members, and has now adopted its own registration system.

An additional argument by the state is that the excise taxes were paid voluntarily and thus cannot be recovered back as a matter of law or equity. Taxes that are voluntarily paid because of a mistake of law cannot be recovered back, *see Security National Bank of Watertown v. Young*, 55 F.2d 616, 619 (8th Cir.), *cert. denied*, 286 U.S. 551 (1932), but taxes paid under duress or coercion are recoverable, and state refund procedures do not limit such recovery. *McKesson*, 496 U.S. at 31; *Board of Comm'rs of Jackson*

County v. United States, 308 U.S. 343, 350 (1939) (citing *Osage County*, 251 U.S. 128 and *Ward*, 253 U.S. 17).

The record related to the nature and amount of the damage claims in the Cheyenne River case has not been fully developed. There is anecdotal evidence describing informal protests by several tribal members at the time of payment, claiming that the tax was paid to avoid criminal penalties, and suggesting that the state refund procedure is inadequate. These issues were not reached by the district court because of the mistaken view that damages were necessarily barred. The judgment should be reversed to the extent that it eliminated any possibility of damages. On remand the district court should determine whether damages should be awarded and, if so, in what amount.

II.

The Rosebud Sioux Tribe is also a federally recognized Indian tribe, and the initial history of the Rosebud Indian Reservation parallels that of the Cheyenne River reservation. Initially part of the Great Sioux Reservation established by the Fort Laramie Treaty, 15 Stat. 635, the Rosebud reservation was set apart by the Act of March 2, 1889, 25 Stat. 888, 892. The reservation was diminished by Congressional acts near the turn of the century, and now consists of Todd County, South Dakota. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977). Tribal members living on allotted lands outside the reservation are considered to be in Indian country. *Id.* at 615 n. 48.

On October 3, 1994, the Rosebud Sioux Tribe brought suit in federal district court against the South Dakota

Secretary of Revenue for declaratory and injunctive relief against the imposition of state motor vehicle excise taxes and registration fees on Indians residing on the reservation. The case was assigned to the same judge before whom the Cheyenne River action was pending. The Secretary filed a motion to dismiss, and the tribe moved for a preliminary injunction.

On February 23, 1995, the same day that judgment was entered in the Cheyenne River case, the district court held a hearing on the motions in the Rosebud case. On May 23, 1995 it issued an opinion and order denying the Secretary's motion to dismiss, partially granting and partially denying the tribe's request for a preliminary injunction, and transferring the case to another judge. The opinion and order was short, and the court did not make detailed findings or discuss the basis for its disposition.

The district court's opinion recognized that the issues were similar to those raised in the Cheyenne River case. It granted a preliminary injunction against the collection of the motor vehicle registration fee from tribal members who drive only within the undiminished portion of the Rosebud reservation, but denied the tribe's motion in all other respects. It did not specifically enjoin the collection of the excise tax from tribal members living on the reservation, and the tribe filed this interlocutory appeal from that partial denial of its motion.[16]

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[16] At the time the case was argued on appeal, there was no indication that the case had proceeded any further in district court. The Secretary has yet to file an answer to the complaint or to assert any defenses.

The Rosebud tribe argues that the reasoning in the Cheyenne River case should apply to Indians residing on the Rosebud reservation and that the district court erred by failing to enter an injunction against the collection of excise taxes. The tribe argues that the order is inconsistent with the Cheyenne River judgment because it did not enjoin the state from continuing to collect excise taxes from members of the Rosebud tribe living on the reservation. The Secretary responds that the district court did not abuse its discretion when it partially denied the motion for a preliminary injunction and that the merits of the underlying action are not an issue on appeal.

The issue on this interlocutory appeal is whether the district court abused its discretion or committed an error of law.[17] *See Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 988 F.2d 61, 63 (8th Cir. 1993). Although the order would be easier to review if it contained more detailed findings and reasoning, it appears that the earlier ruling in the Cheyenne River case was a major factor in the court's thinking. The same judge had entered a declaratory judgment in that case three months before, holding that South Dakota could not impose its motor vehicle excise tax on tribal members living on the reservation. In its opinion in that case, the district court denied injunctive relief since there was "no reason to believe the defendants will not comply with the requirements of this decision." Implicit in its Rosebud ruling is a similar assumption that the

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[17] The Rosebud tribe also seeks entry of judgment in its favor on the excise tax issue, but the only issues before us on this interlocutory appeal relate to the injunction.

state was complying with the requirements of the Cheyenne River decision and had stopped collecting excise taxes from tribal members living on reservations. Injunctive relief is unnecessary where there is no showing of irreparable harm, and nothing in the record suggests that South Dakota continues to collect the excise tax from tribal members residing on Indian reservations. The tribe has not shown that the grant of only partial relief was an abuse of discretion or clearly erroneous.

III.

In conclusion, the judgment entered in the Cheyenne River case is affirmed in part and reversed in part and remanded for consideration of the remaining damages issues. The order granting partial injunctive relief in the Rosebud case is affirmed.

ROSS, Circuit Judge, concurring in part and dissenting in part.

I concur in the majority opinion to the extent that it concludes the State of South Dakota has the authority to impose an annual motor vehicle registration fee on Native Americans who live within the boundaries of a reservation. S.D. Codified Laws Ann. § 32-5-5. I dissent, however, with respect to the majority's conclusion that the State lacks the authority to impose the motor vehicle excise tax set forth in S.D. Codified Laws Ann. § 32-5B-1. In my opinion, the excise tax is indistinguishable from a sales tax levied on the sale of motor vehicles, and as such is a valid state tax on a non-reservation transaction. I also dissent from the majority's determination that the State of South Dakota must refund the taxes previously paid.

The South Dakota motor vehicle excise tax is a one-time tax based on the purchase price of a motor vehicle, and is collected by the county when application is made for a South Dakota motor vehicle title. S.D. Codified Laws Ann. § 32-5B-10. It is clear that all of the sales occur outside the reservation. Although the majority attempts to distinguish the excise tax from a sales tax based on the fact that the excise tax is collected at the time of registration by a government employee, as opposed to at the time of sale by the seller, the excise tax and its method of collection are virtually identical to the taxes imposed upon the disposition of motor vehicles by every other state within our circuit. In all cases, the taxes operate in a similar fashion, yet are given various labels. While each of the seven states within our circuit levy similar taxes, I will discuss only those five states, including South Dakota, that also have a reservation within their borders.[18]

The State of Nebraska imposes a one-time "sales" tax, based on the purchase price of the motor vehicle. Neb.

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[18] Although Arkansas and Missouri do not have Indian reservations within their borders, I note that both of these states impose and collect sales taxes on the disposition of motor vehicles in a manner identical to that of their sister states. The State of Arkansas imposes a "gross receipts tax" on the sale of motor vehicles. Ark. Code Ann. § s 26-52-510. This tax is "paid by the consumer to the Director of the Department of Finance and Administration instead of being collected by the dealer or seller, . . . at the time of registration." *Id.* § 26-52-510(a)(1)(A). Similarly, the State of Missouri imposes a "sales" tax upon the sale of a motor vehicle. The tax is not collected by the seller but by the state department of revenue at the time of registration. Mo. Rev. Stat. §§ 144.069, 144.070.

Rev. Stat. § 77-2703(1)(i). Although called a "sales" tax, the tax is not collected by the retailer at the time of the sales transaction, as is the case with retail sales in general. *Id.* §§ 77-2703(1)(a). Instead, the motor vehicle sales tax is collected by a county official at the time the vehicle is registered.

The State of North Dakota imposes a one-time "excise" tax based on the purchase price of the motor vehicle. N.D. Cent. Code § 57-40.3-02. Again, the tax is collected by the director of the department of transportation at the time of vehicle registration. *Id.* § 57-40.3-12. Because of the imposition of the motor vehicle excise tax, the sale of motor vehicles is specifically exempted from North Dakota's sales tax. *Id.* § 57-39.2-04(13).

The State of Iowa calls its one-time tax upon the sale of motor vehicles a "use" tax, Iowa Code Ann. § 423.7, even on the in-state purchases of motor vehicles. The tax is collected by the county treasurer at the time of vehicle registration. *Id.* § 423.7. Because of the imposition of this use tax, the sale of motor vehicles is specifically exempted from Iowa's sales tax. *Id.* § 422.45(4).

Finally, the State of Minnesota imposes a one-time tax called a "sales tax on motor vehicles." Minn. Stat. Ann. § 297B.02. The tax is based on the purchase price of the motor vehicle and is collected by the motor vehicle registrar, not by the seller at the time of sale. *Id.* § 297B.11. As with the other states in our circuit, Minnesota has reciprocity with other states in the form of a use tax, applicable, in part, to out-of-state purchases. *Id.* § 297B.08. Again, because of the tax imposed under § 297B.02, the sale of motor vehicles is specifically exempted from the

general sales taxes levied under § 297A. *Id.* § 297B.13. A particularly interesting point to note regarding Minnesota's motor vehicle tax, is that prior to 1994, what is now denominated a "sales tax on motor vehicles" was labeled a "motor vehicle excise tax." The 1994 amendment modified only the label ascribed to the tax, leaving the taxing scheme otherwise unchanged.

The majority attempts to distinguish the taxing scheme found to be valid in *Tunica-Biloxi Tribe v. Louisiana*, 964 F.2d 1536 (5th Cir. 1992), noting as significant that "*Tunica* involved a Louisiana tax on the 'sale at retail' of any item of property within the state." *Ibid.* at 9-10. Regardless of the label given to the tax by the Louisiana legislature, however, Louisiana's taxing scheme is virtually identical to every other motor vehicle taxing scheme within our circuit. Relying exclusively on form rather than substance, the majority overlooks the fact that Louisiana sales tax on motor vehicles is collected, not by the seller at the time of the sale, but by the "vehicle commissioner as the agent of the collector of revenue at the time of application for a certificate of title or vehicle registration license." La. Rev. Stat. Ann. § 47:303B(1).

The majority's attempt to distinguish the Louisiana tax from the South Dakota tax is simply unavailing. The majority's only noted distinction between the two taxes is that "[p]urchasers from outside Louisiana could also be subject to the sales tax unlike the South Dakota tax which is not applied to out-of-state purchasers." *Ibid.* at 10. This is a distinction without basis. Both the South Dakota and the Louisiana taxes are identical in that neither differentiates between resident or non-resident purchasers in the

imposition of their respective taxes. Instead, both resident and non-resident purchasers must pay the tax at the time the vehicle is registered in either South Dakota or Louisiana, unless the purchaser can show that the tax has been paid to another state. This is simply the use tax component of a typical sales tax scheme and in no way detracts from its characterization as a sales tax. But for the label attributed to the taxes, *Tunica* is indistinguishable from the case now before us.

I also disagree with the majority that the South Dakota excise tax resembles the personal property taxes found to be invalid in *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). In both *Colville* and *Moe*, the court invalidated the imposition of taxes assessed annually at a percentage of market value of the vehicles. Rejecting the State of Washington's attempt to exalt form over substance, the Court noted that "the only difference between the taxes [in *Colville*] and the one struck down in *Moe* is that [the former] are called excise taxes and imposed for the privilege of using the vehicle in the State, while the Montana tax was labeled a personal property tax." *Colville*, 447 U.S. at 163. The important distinction between the taxes in *Colville* and *Moe* and the South Dakota excise tax, is that the taxes in *Colville* and *Moe* were annual taxes contingent upon the continued ownership of a motor vehicle. In sharp contrast, the tax at issue here is a one-time tax triggered upon the disposition of a motor vehicle. *Colville* and *Moe* simply are not controlling in the present case.

Sac and Fox is also distinguishable from the case now before us. The Supreme Court noted as significant several times throughout its discussion that the excise tax at issue in *Sac and Fox* was paid "in addition to the state sales tax,"[19] 508 U.S. at 119, 126, 127. Accordingly, the Court rejected the state's argument that the excise tax resembled a sales tax on transactions occurring outside Indian country. *Id.* at 126. Just the opposite is true here, where South Dakota law specifically states that the excise tax "shall be in lieu of any tax levied . . . on the sales of such vehicles." S.D. Codified Laws Ann. § 32-5B-1. Unlike *Sac and Fox*, the South Dakota motor vehicle excise tax is meant to be in lieu of the state's sales tax, not to augment it.

In my view, the majority relies upon distinctions without substance in concluding that the excise tax is not the equivalent of a sales tax. First, the majority finds significant the fact that the tax is not collected by the automobile dealer at the time of the sale, but instead is collected by the county treasurer at the time application is made for a South Dakota motor vehicle title. As previously stated, however, this procedure in tax collection is the same procedure used by all of the states within our circuit, including those that call the tax a "sales" tax.

Second, the majority makes much of the fact that "the tax does not apply to all motor vehicle sales in the state, but only to those resulting in ownership by a South Dakota resident," and "[c]onversely, the excise tax does

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[19] Oklahoma's "sales" tax levied on motor vehicles was not challenged in *Sac and Fox*.

apply to vehicles purchased out of state by South Dakota residents." *Ibid.* at 9. What the majority describes, however, is simply the complementary use tax element of a retail sales tax scheme. *See, e.g.*, La. Rev. Stat. Ann. § 47:303A(3); Minn. Stat. Ann. §§ 297A.14(1), (2), 297B.08; Neb. Rev. Stat. § 77-2703(2). The existence of a use tax within the state's taxing scheme does not nullify, or in any way alter, the nature of its sales tax.

South Dakota's excise tax is the equivalent of a sales tax on motor vehicles. The fact that the tax is applied only to motor vehicles and not the general sale of personal property does not alter the substance of the tax in any way. My concern with the holding adopted by the majority today is the far-reaching ramifications this decision is sure to have on the taxing schemes of other states within our circuit, and conceivably in other circuits as well. Each of the remaining four states within our circuit, which also have Indian reservations within their boundaries, impose motor vehicle taxes virtually identical to that struck down by our court today. As with South Dakota, the remaining four states impose a one-time tax; based on the purchase price of the motor vehicle; imposed in lieu of the general retail sales tax; collected not by the retailer at the time of sale, but by a county official at the time of registration; and have complementary use tax provisions. Two of the four states now call their one-time tax a "sales" tax, although identical in all other respects to the "use" or "excise" taxes of their sister states. The question is whether this difference in nomenclature will be sufficient to withstand our court's scrutiny?

By failing to recognize the similarities between Louisiana and South Dakota's taxing schemes, the majority

now creates a split among the circuits with regard to the validity of taxing the off-reservation sales of motor vehicles. Further, by failing to recognize the distinct method of collecting motor vehicle sales taxes, as opposed to other retail sales taxes, by every state in our circuit and possibly the majority of states across this country, our court today takes a step toward a blanket invalidation of sales taxes on the off-reservation purchases of motor vehicles. This clearly intrudes upon the Supreme Court's affirmation that "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State," including its state tax laws. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

Because it is my opinion that the South Dakota excise tax functions as a valid sales tax of off-reservation transactions, I would uphold S.D. Codified Laws Ann. § 32-5B-1. Accordingly, I respectfully dissent from the majority opinion to the extent that it concludes otherwise. I note that the other states within our circuit may wish to seek leave to file amicus briefs in the event a petition for rehearing is requested and granted in this case.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA, on behalf of the Cheyenne River Sioux Tribe and its members, Plaintiff, and CHEYENNE RIVER SIOUX TRIBE, Plaintiff-Intervenor, -vs- The STATE OF SOUTH DAKOTA and RONALD SCHREINER, State Secretary of Revenue; DEWEY COUNTY, and JOHN ALLEY, County Treasurer; and ZIEBACH COUNTY and VIRGINIA HERTEL, County Treasurer, Defendants.	Civ. 92-3035 MEMORANDUM OPINION AND ORDER

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The United States and the Cheyenne River Sioux Tribe seek to enjoin the State of South Dakota and defendant counties from collecting motor vehicle excise taxes and annual license fees from Indians residing on the Cheyenne River Reservation. Each party has filed a motion for summary judgment, and the motions were heard on January 25, 1995.

Background

The Cheyenne River Sioux Tribe is a federally recognized Indian tribe whose reservation lies within the boundaries of Dewey and Ziebach Counties in South

Dakota. The Tribe has enacted ordinances for the registration of motor vehicle titles of tribal members and for the issuance of tribal motor vehicle license plates, but the ordinances have not been implemented.

South Dakota charges residents of the state an excise tax on newly purchased motor vehicles,[1] which is a one time tax of 3% of the purchase price of a motor vehicle and is collected when application is made for a South Dakota motor vehicle title. S.D.C.L. § 32-5B-14 (1989).

South Dakota also charges an annual registration fee based on weight,[2] which ranges from $20 to $40 per vehicle per year and is collected at the time the owner obtains the license plates or renewal tags.

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[1] S.D.C.L. § 32-5B-1. Imposition of tax – Rate – Failure to pay as misdemeanor. In addition to all other license and registration fees for the use of the highways, a person shall pay an excise tax at the rate of three percent on the purchase price of any motor vehicle, . . . , purchased or acquired for use on the streets and highways of this state and required to be registered under the laws of this state. This tax shall be in lieu of any [sales tax] on the sales of such vehicles. Failure to pay the full amount of excise tax is a Class 1 misdemeanor.

[2] S.D.C.L. § 32-5-5. Registration fee based on weight – Certification of correct weight. Subject to the provisions of §§ 32-5-17 to 32-5-45, inclusive, license fees and compensation for use of the highways, fees shall be based, except as otherwise specifically provided, upon manufacturers' weights, including accessories. If a noncommercial motor vehicle is an automobile, pickup truck or van with a manufacturer's shipping weight, including accessories, of six thousand pounds or less, the license fees for such a motor vehicle shall be as provided by § 32-5-6. . . . These fees shall be paid annually to the county treasurer, and shall be as provided by this chapter.

South Dakota does not enforce its motor vehicle laws against Indians on the reservation. It does require that every vehicle being operated off the reservation have valid license plates. Because the tribe does not currently issue license plates, Indians residing on the reservation are required to obtain South Dakota license plates when they operate their vehicles off the reservation.

Issues

The issues in this case are:

(1) Whether the State of South Dakota can enforce its motor vehicle registration and license laws on the Cheyenne River Reservation against tribal members?

(2) Whether the State of South Dakota can require tribal members residing on the Cheyenne River Reservation to pay the South Dakota motor vehicle excise tax?

(3) Whether the State of South Dakota can require tribal members residing on the Cheyenne River Reservation to pay the registration fee and display valid South Dakota license plates on their motor vehicles while being driven off the reservation?

(4) Whether the principles of law regarding taxation applicable to tribal members are equally applicable to nonmembers who are Indian?

(5) Whether the defendants are required to pay damages based on motor vehicle taxes and fees collected from tribal members in the past?

Decision

I.

The doctrine of Indian tribal sovereignty is a deeply rooted policy in our Nation's history. *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 113 S.Ct. 1985, 1991 (1993) ("Sac and Fox"). This doctrine prevents states from asserting tax jurisdiction over an Indian tribe or tribal members residing and working on reservation lands. *Id.*

It follows that the State of South Dakota cannot, and does not, enforce its motor vehicle registration and license fees against members of the Cheyenne River Sioux Tribe who reside on the reservation while they are driving their vehicles on the reservation. Tribal members are required to comply only with tribal ordinances while on the reservation and are free to drive on the reservation without registering and licensing their motor vehicles with the State of South Dakota.

II. Motor Vehicle Excise Tax

A.

The United States Supreme Court has held that certain personal property taxes and excise taxes on motor vehicles owned by tribal members residing in Indian country or on a reservation are unlawful. *Sac and Fox*, 113 S.Ct. at 1993; *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 162-164 (1980) ("Colville"); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 480-481 (1976) ("Moe"). The taxes in the above cases were assessed annually based on a percentage of

the value of the motor vehicle. *Sac and Fox*, 113 S.Ct. at 1993.

South Dakota's excise tax is essentially the same type of tax as those prohibited by the United States Supreme Court. *Id.* Although South Dakota's excise tax is a one-time rather than an annual tax, it remains in essence a personal property tax, as it is based on a certain percentage of the purchase price or value of the vehicle. S.D.C.L. § 32-5B-1.

The fact that the tax is in lieu of a sales tax does not make it lawful because it is not in fact a sales tax. It is not assessed against all persons purchasing a motor vehicle in South Dakota. *Id.* It is assessed only when a buyer seeks to obtain a South Dakota motor vehicle title. *See* S.D.C.L. § 32-5B-14. Furthermore, South Dakota's excise tax is not "tailored" to the amount of actual off-reservation use. *See Colville*, 447 U.S. at 163-164. It follows that the State cannot collect the excise tax set out at S.D.C.L. § 32-5B-1 from tribal members residing on the Cheyenne River Reservation.

B.

The Cheyenne River Sioux Tribe's Ordinance No. 64, Section 13, makes reference to tribal motor vehicle titles, but the record herein does not indicate that the Tribe has an ordinance establishing the substantive or procedural process for registering motor vehicle titles for tribal members, or for maintaining a record of liens on such motor vehicles.

While the State cannot collect its excise tax, it can collect a reasonable fee for registering motor vehicles and maintaining a record of liens thereon of those tribal members desiring to have South Dakota motor vehicle titles for their vehicles. It seems probable that until the Tribe develops a credible procedure for recording and maintaining a record of liens on motor vehicles, lendors might be reluctant to finance motor vehicles for tribal members.

While not being required to do so, the State and Tribe could by compact enter into an agreement wherein the State would continue to issue South Dakota motor vehicle titles for tribal members and maintain a record of liens on their vehicles, and could collect and remit the excise tax provided by the Tribe's Ordinance No. 64, for which the State would receive reasonable reimbursements for its cost of doing so.

C.

Because some tribal members own motor vehicles with nonmembers, some confusion might exist as to whether those vehicles are subject to South Dakota's excise tax. To comply with Supreme Court precedent regarding taxation of tribal members residing on a reservation, it is necessary that any motor vehicle in which one of the owners is a tribal member residing on the reservation be treated as non-taxable to the same extent as other tribal members' vehicles. *See Sac and Fox*, 113 S.Ct. at 1991.

III. Motor Vehicle Registration and Licensing fee

South Dakota's annual registration fee is based on weight and age of the vehicle and is collected at the time the owner receives the license plates or renewal tags. S.D.C.L. § 35-2-2 et seq. This fee is collected by the county treasurer in the county in which the vehicle owner resides. S.D.C.L. § 32-5-5.

South Dakota's registration or license fee is similar to the registration fee discussed in *Moe*. 425 U.S. at 469. It is a nondiscriminatory vehicle registration fee which is used solely for road and bridge purposes. *See Confederated Salish & Kootenai Tribes v. State of Montana*, 392 F.Supp. 1325, 1326, n.2 (D.Mont. 1975).

Tribal members who elect not to purchase South Dakota license plates do not have to pay the annual registration and licensing fee. However, if they desire to have South Dakota license plates, they may properly be required to pay this fee. If they elect to acquire South Dakota license plates for off-reservation use or for any other reason, South Dakota's annual registration and licensing fee, like the registration fee in *Moe, supra*, may validly be applied to tribal members residing on the Cheyenne River Reservation. 425 U.S. at 469.

IV. Taxation of Nonmember Indians

The fourth issue is whether the rules prohibiting taxation of tribal members applies with equal force to nonmember Indians. The short answer is that they do not. *See Colville*, 447 U.S. at 160-161. Nonmember Indians do

not participate in tribal government and there is no reason based on tribal sovereignty for treating nonmember Indians any differently than other nonmembers residing on the reservation. *Id.*

In the most recent case involving taxation of motor vehicles, *Sac and Fox*, 113 S.Ct. 1985, the Supreme Court carefully limited its holding to tribal members throughout the opinion.

V. Preliminary Injunction

Intervenor Cheyenne River Sioux Tribe seeks a preliminary injunction to enjoin the state taxation which is the subject of this action.

Because the Court has granted Intervenor the relief to which it is entitled, no preliminary injunction is required. The Court has no reason to believe the defendants will not comply with the requirements of this decision. The request for a preliminary injunction will be denied, without prejudice to the Tribe's right to seek relief if the defendants fail to comply with the law set out herein.

VI. State's Counterclaim

The defendant State of South Dakota asserted in its counterclaim that reducing any motor vehicle taxes paid by tribal members will deprive the State of funds to repair roads and bridges on the reservation, and seeks an order of this Court directing the plaintiff United States to pay to the State a sum of money equal to reduction in revenues which may result from the Court granting any relief in this action to plaintiff or intervenor.

While a portion of each tax is expended locally, most of the money goes to the State and is then apportioned back to the counties on a formula based principally on the miles of roads in the county. S.D.C.L. §§ 32-11-4.1, 32-11-5, 32-11-7. It has been suggested that because defendant counties are large, sparsely populated counties, they receive more money back in the allocation than is collected in the counties.

It would be highly speculative to attempt to determine how much, if any, defendant counties will lose in highway funds as a result of this decision. In any event, I conclude it is not necessary to do so. The State has not presented any persuasive authority in support of its counterclaim and I have not found any, therefore the motion to dismiss the counterclaim will be granted.

VII. Damages

Plaintiff and intervenor seek to recover damages for motor vehicle taxes and fees paid for fiscal years 1986 through the present.

While motor vehicles taxes and fees have been the subject of litigation in other districts and the United States Supreme Court has developed a body of law relating thereto, none of the decisions suggest that either those cases or any future litigation in other districts should be applied retroactively. I decline to do so in this case, and the defendants' motions for summary judgment will be granted as to the damage claims.

VIII. Tribal License Plates

The Cheyenne River Sioux Tribe, in 1994, enacted Ordinance No. 63, Annual Registration and License Plates Ordinance and Ordinance No. 64, Motor Vehicle Excise Tax Ordinance. Neither of these ordinances have been implemented because the Tribe did not want to subject its members to duplicate taxation.

The issue has been raised in this case whether South Dakota would be required to recognize tribal license plates when tribal members use their motor vehicles off the reservation but within the State. The State has taken the position in the past that it would not recognize tribal license plates for off-reservation use by tribal members. *State of South Dakota v. Means*, No. 87-437, Letter Opinion, Judge Merton Tice, Jr., Seventh Judicial Circuit Court, Rapid City, South Dakota, September 23, 1987.

Because the Tribe does not issue tribal license plates at this time, I conclude this issue is not ripe for decision.

IX. Conclusion

I conclude that the issues raised by this litigation must be decided as follows:

(a) That the State of South Dakota cannot require intervenor or its members to pay the motor vehicle excise tax.

(b) That the State of South Dakota can require tribal members to pay a reasonable fee if they elect to acquire a South Dakota motor vehicle title.

(c) That the State of South Dakota cannot require tribal members to have South Dakota license plates on their motor vehicles when used on the reservation, but can require tribal members to have valid license plates on their vehicles when used off the reservation.

(d) That the State of South Dakota can require tribal members to pay the annual registration fee as a prerequisite to obtaining South Dakota license plates.

Therefore, upon the record herein,

IT IS ORDERED:

(1) That the motions for summary judgment by plaintiff United States, Doc. 126, and intervenor Cheyenne River Sioux Tribe, Doc. 142, are granted to the extent that (a) the South Dakota excise tax, S.D.C.L. § 32-5B-1, may not be collected from tribal members residing on the reservation, and (b) the South Dakota annual registration fee, S.D.C.L. § 32-5-5, may not be collected from tribal members residing on the reservation who do not operate their motor vehicles off the reservation; and the motions are denied in all other respects.

(2) That the motions for summary judgment by defendant State of South Dakota, Doc. 137, defendant Ziebach County, Doc. 131, and defendant Dewey County, Doc. 134, are granted to the extent that (a) tribal members residing on the reservation shall be required to pay the annual registration fee if they desire to obtain South Dakota motor vehicle license plates, and (b) the defendants are not required to pay damages to the plaintiff or intervenor based on motor vehicle excise taxes and

annual registration fees paid by tribal members in the past; and the motions are denied in all other respects.

(3) That plaintiff United States' motion for judgment on the counterclaim, Doc. 128, is granted.

(4) That intervenor's motion for preliminary injunction, Doc. 145, is denied.

Dated this 21st day of February, 1995.

BY THE COURT:

/s/ John B. Jones
Senior U.S. District Judge

ATTEST:
WILLIAM F. CLAYTON, CLERK
By: _____
Deputy

(Seal)

FILED:
February 23, 1995
William F. Clayton
KMH Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

****

UNITED STATES OF AMERICA, on behalf of the Cheyenne River Sioux Tribe and its members,

Plaintiff,

and

CHEYENNE RIVER SIOUX TRIBE,

Plaintiff-Intervenor,

v.

THE STATE OF SOUTH DAKOTA and RONALD SCHREINER, State Secretary of Revenue; DEWEY COUNTY, and JOHN ALLEY, County Treasurer; and ZIEBACH COUNTY and VIRGINIA HERTEL, County Treasurer,

Defendants.

Civ. 92-3035

JUDGMENT

****

The above-entitled matter having come on before the Court on briefs and oral arguments and the Court having entered its Memorandum Opinion and Order, it is hereby

ORDERED, ADJUDGED AND DECREED:

(1) That the South Dakota motor vehicle excise tax, S.D.C.L. 32-5B-1, may not be collected from intervenor or its members who reside on the Cheyenne River Sioux

Reservation as to any motor vehicle which has a tribal member as the owner or co-owner.

(2) That Cheyenne River Sioux Tribe members who desire to get a South Dakota motor vehicle certificate of title may do so upon payment of a reasonable fee to the State of South Dakota, and without being required to pay the excise tax.

(3) That South Dakota motor vehicle laws and taxes may not be enforced against Cheyenne River Sioux Tribe members while they are operating motor vehicles on the reservation.

(4) That the South Dakota annual registration fee, S.D.C.L. 32-5-5, may be collected from any tribal members purchasing South Dakota license plates.

(5) That the State of South Dakota can require Cheyenne River Sioux Tribe members to have valid license plates on their motor vehicles when they operate their motor vehicles within the State of South Dakota but off the reservation.

(6) That intervenor's motion for an injunction is denied.

(7) That the State of South Dakota's counterclaim for damages against the United States is denied.

(8) That the defendants are not required to pay damages to plaintiff or intervenor based on motor vehicle excise taxes and annual registration fees paid by tribal members in the past.

Dated this 23rd day of February, 1995.

WILLIAM F. CLAYTON, Clerk
By: /s/ Kathleen M. Hammond
Deputy

FILED:
May 8, 1995
William F. Clayton
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

****

UNITED STATES OF AMERICA, on behalf of the Cheyenne River Sioux Tribe and its members,

Plaintiff,

and

CHEYENNE RIVER SIOUX TRIBE,

Plaintiff-Intervenor,

v.

THE STATE OF SOUTH DAKOTA and RONALD SCHREINER, State Secretary of Revenue; DEWEY COUNTY, and JOHN ALLEY, County Treasurer; and ZIEBACH COUNTY and VIRGINIA HERTEL, County Treasurer,

Defendants.

CIV. 92-3035

ORDER DENYING MOTION TO AMEND JUDGMENT

****

The Court entered a Memorandum Opinion and Order on February 21, 1995, deciding the issues herein.

The Cheyenne River Sioux Tribe has made a Motion to Amend the Judgment, Doc. 171, and the parties have briefed the issues therein. The Tribe seeks to have the decision of the Court broadened to apply to not only the

members of the Cheyenne River Sioux Tribe but all members of the Sioux Nation. No authority has been cited in support of the principle of extending tribal sovereignty beyond the Tribe and its members, and I have found none. While the desire to extend the opinion as broadly as possible is understandable, and while the Tribe may undoubtedly feel some affinity to other Sioux Tribes, the motion must be denied, for the reasons previously stated.

Upon the record herein,

IT IS ORDERED:

(1) That the Cheyenne River Sioux Tribe's Motion to Amend the Judgment, Doc. 171, is denied.

Dated this 5th day of May, 1995.

BY THE COURT:

/s/ John B. Jones
Senior U.S. District Judge

ATTEST:
WILLIAM F. CLAYTON, CLERK
By: /s/ Vicki J. Reinhard
Deputy

(Seal)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 95-2529
95-2535
95-2720

United States of America, on behalf of the Cheyenne River Sioux Tribe and its members,	)	
Plaintiff/Appellant/Cross Appellee,	)	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
Cheyenne River Sioux Tribe,	)	
Intervenor Plaintiff/ Appellant/Cross Appellee,	)	
v.	)	
State of South Dakota; Julie M. Johnson, State Secretary of Revenue,	)	
Defendants/Appellees/Cross Appellants,	)	
Ronald J. Schreiner; Dewey County, South Dakota; John Alley, County Treasurer; Ziebach County, South Dakota; Virginia Hertel, County Treasurer,	)	
Defendants/Appellees.	)	

The suggestion for Rehearing en banc is denied. Judge Bowman, Judge Wollman, Judge Magill, Judge Beam, and Judge Hansen would grant the suggestion.

The petition for rehearing by the panel is also denied.

May 13, 1997

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

EXECUTIVE RESOLUTION NO. E-26-87-CR

WHEREAS, the Cheyenne River Sioux Tribe of South Dakota is an unincorporated tribe of Indians, having accepted the provisions of the Act of June 18, 1934 (48 Stat. 984), and

WHEREAS, the tribe, in order to establish its tribal organization; to conserve its tribal property; to develop its common resources; and to promote the general welfare of its people, has ordained and established a Constitution and By-laws, and

WHEREAS, the present Cheyenne River Sioux Tribe Law & Order Code does not address the operation of motor vehicles, and

WHEREAS, the Cheyenne River Sioux Tribal Council Law & Order Committee deems it necessary that a person operating a motor vehicle be required to have in his/her possession a valid South Dakota Driver's License for the safety and protection of all tribal members, now

THEREFORE BE IT RESOLVED, by the Cheyenne River Sioux Tribe that those provisions of the South Dakota Traffic Code dealing with vehicle Licensing and Driver's License be incorporated as part of the Law & Order Code of the Cheyenne River Sioux Tribe.

CERTIFICATION

This is to certify that the foregoing resolution has been reviewed and approved by the undersigned Executive Committee acting under Resolution No. 181-83-CR, and

in the best interest of the Cheyenne River Sioux Tribe this 14th day of January, 1987 in Eagle Butte, South Dakota.

/s/ Wayne Ducheneaux
Wayne Ducheneaux, Chairman

/s/ Arlene Thompson
Arlene Thompson, Secretary

/s/ Mona R. Cudmore I
Mona R. Cudmore I, Treasurer

Received:
Date: 2/4/87
CRST COUNCIL
/s/ Arlene Thompson
Secretary

CHEYENNE RIVER SIOUX TRIBAL COUNCIL

TRIBAL MEMORANDUM:

TO: SUPERINTENDENT, Cheyenne River Agency

FROM: Arlene Thompson, Tribal Secretary

SUBJECT: *EXECUTIVE RESOLUTION NO. E-26-87-CR*: That those provisions of the South Dakota Traffic Code dealing with Vehicle Licensing and Driver's Licenses be incorporated as part of the Law & Order Code of the Cheyenne River Sioux Tribe.

Transmitted herewith is a copy of Executive Resolution No. 26-87-CR, which was confirmed and approved by the Cheyenne River Sioux Tribal Council, during its Regular Session held on February 4, 1987.

cc: Chairman
Treasurer
Superior Judge
Prosecutor
Chief of Police
Central Records
File/1

RESOLUTION NO. 10-90-CR

WHEREAS, the Cheyenne River Sioux Tribe of South Dakota is an unincorporated Tribe of Indians having accepted the provisions of the Act of June, 18 1934 (48 Stat. 984); and

WHEREAS, the Tribe in order to establish its tribal organization, to conserve its tribal property, to develop its common resources, and to promote the general welfare of its people has ordained and established a Constitution and By-laws; and

WHEREAS, the Cheyenne River Sioux Tribal Council has adopted certain provisions of South Dakota motor vehicle law into the Tribal Law and Order Code; and

WHEREAS, upon their adoption into the Tribal Law and Order Code the adopted provisions become tribal law; and

WHEREAS, the Cheyenne River Sioux Tribal Council has mandated that tribal law be cited as tribal law by tribal law enforcement personnel; and

WHEREAS, when tribal law enforcement personnel issue tribal traffic citations, in the section of the citation entitled "In Violation of Sec." the tribal traffic code should be cited as 6-1-1(1)(a) and the issuing officer should list the name of the offense(s) charged, e.g., Reckless Driving. Tribal law enforcement personnel may also include on the traffic citation, solely as a cross reference, the relevant citation from South Dakota Codified Laws; and

WHEREAS, the Executive Committee of the Cheyenne River Sioux Tribal Council, in Executive Resolution E-26-87-CR, adopted the South Dakota law requiring all motor vehicle operators to acquire and keep in their possession a valid South Dakota driver's license at all times when operating a motor vehicle on the Cheyenne River Reservation; and

WHEREAS, E-26-87-CR also adopted, as tribal law, South Dakota law requiring that motor vehicles bear valid South Dakota motor vehicle license plates; and

WHEREAS, because the Tribal Council has adopted E-26-87-CR as Tribal law, when tribal law enforcement personnel issue citations to motor vehicle operators for driving without a license or for driving a vehicle without valid license plates, these offenses are to be cited as E-26-87-CR in the section of the citation entitled "In Violation of Sec.," and the issuing officer is also to list the name of the offense. Tribal law enforcement personnel may also include on the traffic citation, solely as a cross reference, the pertinent statutory reference to South Dakota Codified Laws;

THEREFORE, BE IT RESOLVED that henceforth tribal law enforcement personnel issuing traffic citations shall cite the relevant violation as set forth above.

CERTIFICATION

I, the undersigned, as Secretary of the Cheyenne River Sioux Tribe, certify that the Tribal Council is composed of fifteen (15) members, of whom 13, constituting a quorum, were present at a meeting, duly and regularly called, noticed, convened and held this 5 day of January, 1990, Regular Session; and that the foregoing resolution was duly adopted at such meeting by an affirmative vote of 13 for, 0 against, 0 not voting and 2 absent.

/s/ Arlene Thompson
Arlene Thompson, Secretary
Cheyenne River Sioux Tribe

Supreme Court, U.S.
FILED
OCT 14 1997
CLERK

No. 97-276

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF SOUTH DAKOTA,
GARY VIKEN, SECRETARY OF REVENUE,
Petitioners,

v.

UNITED STATES OF AMERICA, ON BEHALF OF THE CHEYENNE RIVER SIOUX TRIBE AND ITS MEMBERS,
AND
CHEYENNE RIVER SIOUX TRIBE,
AND
DEWEY COUNTY, SOUTH DAKOTA, JOHN ALLEY, COUNTY TREASURER, ZIEBACH COUNTY, SOUTH DAKOTA, VIRGINIA HERTEL, COUNTY TREASURER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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39 pp

QUESTION PRESENTED

Should this Court revisit its rulings in *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 127-28 (1993), *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 163 (1980), and *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 480-81 (1976), that states may not tax motor vehicles owned by Indian tribal members living in Indian country?

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STATUTORY PROVISION

S.D. Codified Laws Ann. § 32-5B-1. Imposition of Tax -- Rate -- Failure to pay as misdemeanor.

In addition to all other license and registration fees for the use of the highways, a person shall pay an excise tax at the rate of three percent on the purchase price of any motor vehicle, as defined by § 32-3-1, purchased or acquired for use on the streets and highways of this state and required to be registered under the laws of this state. The tax shall be in lieu of any tax levied by chapters 10-45 and 10-46 on the sales of such vehicles. Failure to pay the full amount of the excise tax is a Class 1 misdemeanor.

STATEMENT OF THE CASE

The issue here is whether this Court should revisit its rulings in *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 127-28 (1993), *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 163 (1980), and *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 480-81 (1976), that states may not tax motor vehicles owned by Indians living in Indian country. Although petitioners protest to the contrary, both courts below recognized that South Dakota's motor vehicle excise tax is identical in all relevant respects to the motor vehicle taxes struck down in those cases. The only way this Court can grant the relief petitioners seek is to revisit and reverse its decisions in those cases, including its unanimous decision in *Sac and Fox* rendered only four years ago. Review by this Court is not warranted.

Respondent Cheyenne River Sioux Tribe will not repeat petitioners' statement of the case; rather, the Tribe will clarify and supplement the issues raised by petitioners, correcting inaccuracies in their statement.

A. South Dakota's Motor Vehicle Excise Tax.

The State of South Dakota levies an excise tax on motor vehicles owned by state residents. S.D. Codified Laws Ann. § 32-5B-1. The excise tax is an *ad valorem* tax assessed at the rate of three percent of vehicle value. *Id.* The tax is collected only once, at the time of initial registration or application for title, *id.* at § 32-5B-10, by the treasurer of the county in which the vehicle owner resides, *id.* Payment of the tax is a prerequisite to vehicle registra-

tion and the issuance of vehicle titles.[1] *Id.* at § 32-5B-14. All tax proceeds are dedicated to the state highway fund. S.D. Const., Art XI, § 8; S.D. Codified Laws Ann. § 32-5B-17.

The tax is not assessed on nonresidents who drive their vehicles through the state, *id.* at § 32-3-5, or who purchase vehicles in the state. Nor is it assessed on new residents who previously paid a similar tax in another state. *Id.* at § 32-5B-11.

B. The State's Taxation Of Reservation Indians.

The Cheyenne River Sioux Tribe is a federally recognized Indian tribe with sovereign authority over the Cheyenne River Indian Reservation in South Dakota. The Cheyenne River Indian Reservation was established in 1889, Act of March 2, 1889 (25 Stat. 888), and its boundaries have not been diminished. *See South Dakota v. Bourland*, 508 U.S. 679 (1993); *Solem v. Bartlett*, 465 U.S. 463 (1984). The reservation encompasses at least 2.8 million acres of land in north-central South Dakota, *see*, *e.g.*, *Solem*, 465 U.S. at 466 n.6, and is almost as large as Connecticut. The Reservation is comprised of, and wholly includes, Dewey and Ziebach Counties and is home to approximately 11,813 Indians. U.S. Dept. of Interior, Bureau of Indian Affairs, INDIAN SERVICE POPULATION AND LABOR FORCE ESTIMATES 1 (1995).[2]

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[1] A state certificate of title is needed for the lawful operation or possession of a vehicle in the state, S.D. Codified Laws Ann. § 32-3-12, and for the lawful sale or resale of a vehicle in the state, *id.* at §§ 32-3-13 (sale), 32-3-7 (resale).

[2] Indians account for 66%, or essentially two-thirds, of the total (continued...)

Since at least 1986, the State has collected its motor vehicle excise tax from tribal members living on the Cheyenne River Indian Reservation. Tribal members drive primarily on the reservation, but the State requires them to have valid South Dakota license plates when they drive off the reservation. Tribal members cannot obtain state plates without paying the entire excise tax. The State does not tailor the amount of the tax to the amount of actual off-reservation vehicle use.

The State requires tribal members to pay the excise tax regardless of where they purchase their motor vehicles. The State has allowed no exemption for tribal members who purchase their vehicles on the reservation. There are two car dealerships on the reservation, and on-reservation vehicle sales to tribal members are commonplace. *See, e.g.*, C.R.S.T. App. No. 30 at 56.[3]

Although the Tribe and many of its members have objected to the State's taxation, *see* C.R.S.T. App. Nos. 33, 34, 38, 39, 41, 50, tribal members have paid the State's taxes because they knew they would face civil and criminal penalties for driving off-reservation without state license plates and registration stickers.[4]

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[2](...continued)
reservation population. U.S. Dept. of Commerce, Bureau of the Census, 1990 CENSUS OF POPULATION: SOCIAL AND ECONOMIC CHARACTERISTICS, SOUTH DAKOTA 424-25 (1993).

[3] "C.R.S.T. App." refers to the Tribe's appendix in the court of appeals.

[4] Operating a motor vehicle without paying the state excise tax is a class 1 misdemeanor. S.D. Codified Laws Ann. § 32-5B-1. Operating (continued...)

Petitioners' assertion that tribal law required tribal members to pay the State's excise tax, Pet. 11, is unfounded. Petitioners point to tribal resolutions in effect from 1987 to 1994 which incorporated substantive state traffic law provisions by reference, but those laws did not require Indians to pay state taxes.

Petitioners ignore tribal laws and practices which actually addressed state taxation by affirmatively claiming immunity for reservation Indians. From the early 1980's through the present, the Tribe has repeatedly demanded that the State "cease its taxation of reservation Indians' motor vehicles, so that the tribal government could exercise its own authority in this area." C.R.S.T. App. No. 34 at 3. The Tribe made these demands through Tribal Council resolutions, Chey. R. Sx. Tr. Res. Nos. 26b-82-CR (1982), 141-88-CR (1988), 9-91-CR (1991), *reprinted in* C.R.S.T. App. No. 50, and in meetings between tribal and state officials, tribal requests to the Governor's office, and requests for favorable legislation in the State Legislature, C.R.S.T. App. No. 34 at ¶¶ 14-27. In 1992, after these repeated efforts failed, the United States initiated the present lawsuit, and in 1993, the Tribe intervened. Finally, in 1994, the Tribe enacted its own motor vehicle license, registration, and tax laws and again expressed its longstanding position that "federal law and the doctrine of tribal sovereignty bar state authority to tax Indian owned motor vehicles within the

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[4](...continued)
a motor vehicle without state license plates is a class 2 misdemeanor. *Id.* at § 32-5-98. Operating a motor vehicle without a state certificate of registration is a civil petty offense. *Id.* at § 32-5-91. Indians driving off-reservation have, in fact, been subject to arrest under these provisions. *See, e.g., State v. Spotted Horse*, 462 N.W.2d 463 (S.D. 1990), *cert. denied* 500 U.S. 928 (1991).

Reservation." Chey. R. Sx. Tr. Ord. Nos. 63 at § 1(4), 64 at § 1(4); *reprinted in* C.R.S.T. App. Nos. 48, 49. Clearly, tribal law did not authorize state taxation.

C. The State's Infringement On Tribal Self-Government And Self-Determination.

The State's taxation of Indian-owned motor vehicles impedes its efforts to develop its reservation economy. Economic conditions on the Cheyenne River Indian Reservation are bleak; the majority of reservation residents live in poverty.[5] The only way for the Tribe to lift its people out of poverty is to develop its reservation economy. However, substandard road conditions thwart tribal economic development initiatives.[6]

In 1994, the Tribe enacted its own motor vehicle tax laws in order to raise revenue to develop the transportation infrastructure on the reservation. Chey. R. Sx. Tr. Ord. Nos. 63, 64; *reprinted in* C.R.S.T. App. Nos. 48, 49. These laws were approved by the U.S. Secretary of Interior. *Id.* Once implemented, they will allow the Tribe to construct

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[5] Ziebach and Dewey counties are the seventh (7th) and twenty-ninth (29th) poorest counties in the United States, with poverty rates of 51.1% and 44.4%, respectively. U.S. Dept. of Commerce, Bureau of the Census, THE 100 POOREST COUNTIES IN THE UNITED STATES, CPH-L-184 (1990). Among reservation Indians, the unemployment rate ranges from 60 to 90%. Chey. R. Sx. Tr. Ord. No. 64 §1(2) (legislative finding); *reprinted in* C.R.S.T. App. No. 49.

[6] *See* H.R. Rep. No. 102-171(I), 102nd Cong., 1st Sess. at 33 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1526, 1559 ("Substandard conditions on many reservation roads and bridges has a chilling effect on efforts to improve economic and educational opportunities for Native Americans").

tribal roads and maintain them in a good and safe condition. This, in turn, will pave the way for economic development on the reservation:

> having an increased ability to prioritize and implement [tribal] highway projects will increase the Tribe's opportunities for economic development on [the] reservation. . . . [I]nfrastructure to attract companies . . . is critical to the Tribe's welfare and [its] ability to maintain [its] self-government. C.R.S.T. App. No. 36 at ¶¶ 15-16.

The State's taxation of tribal members prevents implementation of the tribal system because tribal members cannot afford to pay both state and tribal motor vehicle taxes. C.R.S.T. App. No. 36 at ¶ 17. The State's unauthorized taxation thus "infringes on [the Tribe's] right to self-government." *Id.*

D. Reservation Roads.

The Bureau of Indian Affairs (B.I.A.) has constructed and now maintains nearly 300 miles of roads on the Cheyenne River Indian Reservation. These roads provide the only access to numerous areas on the reservation, including isolated communities with highly-concentrated Indian populations. C.R.S.T. App. Nos. 12 at ¶ 12, 40 at ¶ 7. The State does not contribute to the construction or maintenance of these roads. C.R.S.T. App. No. 13 at ¶ 19.

The State maintains state highways and roads that traverse the reservation. The construction of those highways

is funded primarily by the federal government.[7]

The Tribe, contrary to petitioners' assertions, Pet. 10 n.10, does contribute to the maintenance of roads on the reservation. For example, in 1994, tribal expenditures for road maintenance were $99,000. C.R.S.T. App. No. 21 at 2. However, the Tribe's ability to fund road programs is severely limited by the State's taxation of tribal members. So, too, is the Tribe's ability to develop reservation road programs that meet the unique needs of tribal members.

E. The Proceedings Below.

With two exceptions,[8] the Tribe does not object to

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[7] In fiscal year 1992, for example, the State received approximately $10.65 million in federal funds for road construction contracts on the Cheyenne River Indian Reservation. *See* C.R.S.T. App. No. 15 at 6; *see also* 23 U.S.C. § 204 (federal funding for state highways on Indian reservations); 23 U.S.C. § 202 (federal offset for "nontaxable Indian lands" within state).

[8] First, the Tribe objects to petitioners' suggestion that the court of appeals found that tribal law, not state law, compelled tribal members to pay the State's excise tax. Pet. 11, *quoting* App. 5-6. ("App." refers to the appendix to the petition for writ of certiorari.) In fact, the court ruled that tribal law *did not* require tribal members to pay state taxes. The court ruled that although tribal law incorporated "certain provisions of the South Dakota traffic code, including the requirement that vehicles bear valid state license plates," App. 19, it did not "address[] the payment of the state excise tax or suggest[] that its collection from tribal members was valid," *id*. To the contrary, the court found, "[t]he tribal council has consistently protested the imposition of state motor vehicle taxes on its members. . . ." *Id*. Second, the Tribe disagrees with petitioners' assessment, curiously set forth in their statement of the case, Pet. 13-14, that the court of appeals "made three errors in its analysis," Pet. 13. As explained below, the court of appeals properly applied this Court's controlling precedents.

petitioners' characterization of the proceedings below. The district court ruled that South Dakota's motor vehicle excise tax is a personal property tax and, as such, it may not lawfully be applied to tribal members living on the Cheyenne River Indian Reservation. App. 36. The court of appeals affirmed, App. 13, and remanded for further development of the record in order to "determine whether damages should be awarded," App. 20, to compensate tribal members for past excise taxes unlawfully collected by the State. Petitioners filed a request for rehearing *en banc*, which was denied. Petitioners now seek review by this Court.

REASONS FOR DENYING THE WRIT

I. The Only Way This Court Can Grant The Relief Petitioners Seek Is To Reverse Its Rulings In Three Cases, Including Its Unanimous Ruling In *Sac And Fox* (1993), That States May Not Tax Motor Vehicles Owned By Reservation Indians.

American Indian tribes are "self-governing political communities that were formed long before Europeans first settled in North America." *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). Although they accepted "the protection of the United States of America" through treaties, *see, e.g., Treaty with the Teton*, 1815, Art. 3 (7 Stat. 125), *reprinted in* II Kappler 112, Indian tribes retain the sovereign status of "domestic dependent nations," *Oklahoma Tax Comm'n v. Potawatomi*, 498 U.S. 505, 509 (1991); *accord Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), and continue to "'possess[] attributes of sovereignty over both their members and their territory,'" *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982), *quoting United States v. Mazurie*, 419 U.S. 544, 557 (1975); *accord Worcester v. Georgia*, 31 U.S. (6 Pet.)

515, 557 (1832).

Indian tribes have a government-to-government relationship with the United States, *see*, *e.g.*, 25 U.S.C. §§ 3601(1), 3701(1); Executive Memorandum, 59 Fed. Reg. 22951 (April 29, 1994), but they are in no way "dependent on" or "subordinate to" the states. *Colville*, 447 U.S. at 154. As a general rule, reservation Indians are subject only to federal and tribal law, not state law. *Williams v. Lee*, 358 U.S. 217 (1959). This is especially true in the area of taxation:

> The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes . . . and in recognition of the sovereignty retained by Indian tribes even after the formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territories.

Montana v. Blackfeet, 471 U.S. 761, 764 (1985) (citations omitted).

In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819), Chief Justice John Marshall reminds us that "the power to tax involves the power to destroy." This Court has long recognized that, if permitted, state taxation of Indian tribes and their members would "essentially destroy[]" tribes by depriving them of their tax base. *Bryan v. Itasca County*, 426 U.S. 373, 388-89, n.14 (1976). Thus, "'[i]n the special area of state taxation of Indian tribes and tribal members,'" this Court has adopted "'a *per se* rule,'" *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 267 (1992) (quoting *California v. Cabazon Band*

of Mission Indians, 480 U.S. 202, 215 n.17 (1987)): "'such taxation is not permissible absent congressional consent,'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (citing *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 171 (1973).

"Taking this categorical approach, [this Court has] held unenforceable a number of state taxes whose legal incidence rested on a tribe or on tribal members inside Indian country," *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995), including state income taxes, *McClanahan*, 411 U.S. at 165-81; *Sac and Fox*, 508 U.S. at 123-26, real property taxes, *United States v. Rickert*, 188 U.S. 432 (1903); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1866); *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866), personal property taxes, *see, e.g.*, *Bryan v. Itasca County*, 426 U.S. 373, 375 (1976), sales taxes, *Moe*, 425 U.S. at 475-481, *Potawatomi*, 498 U.S. at 507; *Dep't of Taxation and Finance of New York v. Attea & Bros.*, 512 U.S. 61, 64 (1994), transaction taxes, *County of Yakima*, 502 U.S. at 268, vendor taxes, *Chickasaw Nation*, 515 U.S. at 459-62; *Moe*, 425 U.S. at 480-81, use taxes, *Mescalero Apache Tribe*, 411 U.S. at 158, mineral royalty taxes, *Montana v. Blackfeet Tribe*, 471 U.S. at 764-66, and hunting and fishing license fees, *see Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Tulee v. Washington*, 315 U.S. 681 (1942).

Three times, this Court has applied its *per se* rule against unauthorized state taxation in Indian country to strike down state taxes on Indian-owned motor vehicles. *Sac and Fox*, 508 U.S. at 127-28 (1993); *Colville*, 447 U.S. at 163 (1980); *Moe*, 425 U.S. at 480-81 (1976). In the case at bar, the Eighth Circuit Court of Appeals merely applied these controlling precedents, as it was bound to do.

A. South Dakota's Excise Tax Is Identical In All Relevant Respects To The Motor Vehicle Taxes Struck Down In *Moe*, *Colville*, And *Sac And Fox*.

The court of appeals correctly held that South Dakota's motor vehicle excise tax "resembles the personal property taxes found to be preempted in *Moe*, *Colville*, and *Sac and Fox*." App. at 12. Indeed, South Dakota's tax is identical in all relevant respects to those taxes.

In *Moe*, 425 U.S. 463 (1976), the first case in the Court's trilogy of Indian motor vehicle tax cases, the Court invalidated a personal property tax imposed by the State of Montana on motor vehicles owned by members of the Confederated Salish and Kootenai Tribes living on the Flathead Reservation. *Id.* at 475-481. The property tax at issue in *Moe* was "assessed annually at a percentage of market value." *Colville*, 447 U.S. at 163 (explaining *Moe*); *see also Confederated Salish & Kootenai Tribes v. Montana*, 392 F.Supp. 1325, 1326 (D. Mont. 1975) (three judge court). Payment of the taxes was required for vehicle registration, *Moe*, 425 U.S. at 469; *Confederated Salish & Kootenai Tribes*, 392 F.Supp. at 1326, and the State imposed the tax on vehicles used both on and off the reservation, *see Colville*, 447 U.S. at 163 & n.30 (explaining *Moe*); *Confederated Salish & Kootenai Tribes*, 392 F.Supp. at 1328-29 (Smith, J., concurring in part and dissenting in part).

Four years later, in *Colville*, 447 U.S. 134 (1980), the Supreme Court enjoined the State of Washington from imposing an excise tax on motor vehicles, mobile homes, campers, and travel trailers owned by tribal members living on the Colville Reservation. *Id.* at 163. Like the personal property tax struck down in *Moe*, Washington's excise tax

was assessed annually and based on a percentage of vehicle value. *Colville*, 447 U.S. at 142-43, 163. Similarly, payment of the tax was required for vehicle registration, *id.* at 142-143, 163-164, and the State sought to impose the tax "upon vehicles owned by the Tribe or its members and used both on and off the reservation," *id.* at 162.

The *Colville* Court found that "the only difference" between Washington's excise tax and the tax struck down in *Moe* was its name and alleged purpose. 447 U.S. at 163. Whereas the tax in *Moe* was labeled a "personal property tax," 425 U.S. at 480, Washington's tax was called an "excise tax" and was imposed for "the privilege of using the vehicle in the State," *Colville*, 447 U.S. at 163; *see also id.* at 142-43. The Court attached no significance to this difference and dismissed the State's argument that its excise tax was permissible because the taxable event was vehicle use within the State:

> We do not think *Moe* and *McClanahan* can be this easily circumvented. While Washington may well be free to levy a tax on the use outside the reservation of Indian-owned vehicles, it may not under this rubric accomplish what *Moe* held was prohibited. Had Washington tailored its tax to the amount of actual off-reservation use, or otherwise varied something more than mere nomenclature, this might be a different case. But it has not done so, and we decline to treat the case as if it had.

Id. at 163-64. The Court held that Washington's excise tax was no different than the property tax struck down in *Moe*. *Id.* at 163.

South Dakota's motor vehicle excise tax is virtually identical to the taxes struck down in *Moe* and *Colville*. It is a tax on vehicle ownership, imposed only on state residents, S.D. Codified Laws Ann. § 32-5B-1, and based on a percentage of vehicle value, *id.* at §§ 32-5B-1, 32-5B-4. Payment of the tax is a prerequisite to vehicle registration, *id.* at § 32-5B-1, and the issuance of state certificates of title, *id.* at § 32-5B-14, and the State imposes the tax on vehicles driven both on and off the reservation. It is true that, unlike the taxes struck down in *Moe* and *Colville*, South Dakota's excise tax is not applied annually, but neither was the excise tax found invalid in *Sac and Fox*. 508 U.S. at 126. A state has no more authority to impose a one-time tax on Indian-owned vehicles than it does to impose a recurring tax.

In *Sac and Fox*, 508 U.S. 114 (1993), the Court's most recent Indian motor vehicle tax case, the Court invalidated an excise tax imposed by the State of Oklahoma on vehicles owned by members of the Sac and Fox Nation living in Indian country. *Id.* at 127-28. Oklahoma's excise tax was a one-time assessment calculated as a percentage of vehicle value. *Id.* at 119. It was "imposed for [vehicle] use both on and off Indian country," *id.* at 127, and payment of the tax was a prerequisite for vehicle registration and the issuance of state certificates of title, *id.* at 119. The Court held that Oklahoma's tax "strongly resemble[d]" the taxes struck down in *Moe* and *Colville* and, therefore, enjoined its application to tribal members living in Indian country. *Id.* at 127.

South Dakota's motor vehicle excise tax is identical in all relevant respects to the Oklahoma excise tax struck down in *Sac and Fox*. Both taxes are collected only once, at the time of initial registration or application for a state certificate of title. *Compare* Okla. Stat. Tit. 68, §

2103(A)(2) *and* S.D. Codified Laws Ann. § 32-5B-10. Both taxes are "calculated as a percentage of the vehicle's value." *See* 508 U.S. at 119. *Compare* Okla. Stat. Tit. 68, § 2103(A)(1) (excise tax levied at rate of three and one-fourth percent of vehicle value) *and* S.D. Codified Laws Ann. § 32-5B-1 (excise tax levied at rate of three percent of vehicle value). Both taxes are imposed on "the transfer and use of . . . vehicle[s]" in the state. *See Sac and Fox*, 508 U.S. at 126. *Compare* Okla. Stat. Tit. 68, § 2103(A)(1) (excise tax levied "upon the transfer of legal ownership of any vehicle registered in th[e] state and upon the use of any vehicle registered in th[e] state") *and* S.D. Codified Laws Ann. 32-5B-1 (excise tax imposed on transfer, by "purchase[] or acqui[sition]," of vehicles "use[d] on the streets and highways of th[e] state and required to be registered").[9] And both taxes are imposed on Indian-owned vehicles driven on and off Indian country.

Quite simply, *Sac and Fox* is on all fours with, and therefore controls, the case at bar.

B. Petitioners' Attempts To Distinguish *Sac And Fox* Are Futile.

Petitioners make several attempts to distinguish *Sac and Fox*. Pet. 21-24. All are fruitless. First, petitioners argue that South Dakota's excise tax is unlike Oklahoma's since its proceeds are "dedicated to the State Highway Fund," whereas the Oklahoma tax is used to generate undedicated, "general governmental revenue." Pet. 22. They are wrong.

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[9] South Dakota's excise tax applies to all transfers of ownership, not just purchases. *See* p. 21, n.17, *infra*.

Like South Dakota's excise tax, Oklahoma's excise tax provides funds for highway programs. By statute, part of the revenue from Oklahoma's excise tax is earmarked "for the maintenance and upkeep of the avenues of public access within th[e] state. . . ." Okla. Stat. Tit. 47, § 1103.

In *Sac and Fox*, this Court attached no significance to Oklahoma's dedication of excise tax revenue to highway programs. Instead, the Court summarily stated that the excise tax is used to "provide funds for 'general governmental functions,'" 508 U.S. at 119, and ruled that it was an unlawful tax on reservation Indians, *id.* at 127-28. Nothing in the Court's decision suggests that the purpose to which tax revenues are dedicated is a relevant, much less decisive, factor in determining whether or not a tax may be imposed on tribal members living in Indian country.[10]

Just as Oklahoma's dedication of tax revenue to highway programs was insufficient in *Sac and Fox* to grant the State jurisdiction to tax reservation Indians, so, too, is

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[10] Similarly, nothing in this Court's decisions supports petitioners' suggestion that "general revenue (not dedicated) is a property tax characteristic." Pet. 27. In *Sac and Fox*, this Court found that Oklahoma's excise tax was a property tax, notwithstanding the dedication of tax revenue to highway programs. And in *California v. Buzard*, 382 U.S. 386 (1966), this Court ruled that California's motor vehicle license fee, the proceeds from which were dedicated to highway programs, *id.* at 384, n. 8, *see also* Cal. Rev. & Tax. Code § 11001, *et seq.*, was a property tax and, as such, could not be imposed on nonresident military servicemen, *id.* at 394-395. (Federal law grants nonresident servicemen broad immunity from state property and income taxes. Soldiers' and Sailors' Civil Relief Act of 1940, *codified at* 50 U.S.C. App. § 574.) The *Buzard* Court found that California's license fee "serve[d] primarily a revenue interest, narrower in purpose but no different from taxes raised to defray the general expenses of government." 382 U.S. at 435.

South Dakota's similar dedication of tax revenue here. This Court has made clear that states may not acquire jurisdiction over reservation Indians by conferring benefits upon them. In *McClanahan*, the Court rejected Arizona's argument that it could tax the income of reservation Indians because it "expend[ed] tax monies for education and welfare" in Indian country. 411 U.S. at 173, n.12. The Court ruled that "'[c]onferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization,'" *id.*, *quoting The Kansas Indians*, 72 U.S. at 757.[11]

Second, petitioners argue that the instant case is distinguishable from *Sac and Fox* because the laws of the Cheyenne River Sioux Tribe required tribal members to pay the state excise tax. Pet. 22. First of all, the Eighth Circuit properly construed the Tribe's laws and rejected this argument. *See* page 7, n.8, *supra*. The Eighth Circuit's construction of tribal law is not "fairly included" in the question petitioners presented to this Court and, thus, is not properly before the Court. Sup. Ct. R. 14.1(a); *Izumi Seimitzu v. U.S. Philips Corp.*, 114 S.Ct. 425, 427 (1993).

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[11] The State of South Dakota is no doubt familiar with this principle, having twice been rebuked when it tried to bootstrap jurisdiction over reservation Indians on the basis that it was funding programs within Indian country. *See Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990) (rejecting State's argument that building and maintaining roads within Indian country conferred jurisdiction upon State over reservation roads), *cert. denied* 500 U.S. 915 (1991); *Valandra v. Veidt*, 259 N.W.2d 510, 513 (S.D. 1977) (rejecting State's argument that dedication of mobile home registration fees to highway programs within Indian country provided "basis for granting jurisdiction over Indian property on a reservation").

In any event, petitioners are wrong. Although tribal law incorporated certain state traffic law provisions between 1987 and 1994, it never required tribal members to pay state taxes. The Tribe merely adopted substantive state law provisions as tribal law, ceding no taxation authority or jurisdiction to the state.[12] In *Johnson v. Yellow Cab*, 321 U.S. 383, 391 (1944), this Court held that statutes, like the tribal laws at issue here, that incorporate the laws of another sovereign do not cede jurisdiction to that sovereign.[13]

Third, petitioners argue that *Sac and Fox* is not controlling because Oklahoma, unlike South Dakota, collects its excise tax in addition to a sales tax on motor vehicles. Pet. 23. Wrong again.

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[12] Given the supremacy of federal law under the Constitution, U.S. Const., Art. VI, the Tribe had every right to expect the State to comply with federal law, including the treaty-based immunity of Indians from state taxation. As state citizens, *see* Act of June 2, 1924, ch. 233 (43 Stat. 253), Indians are entitled to license and register their motor vehicles with the State, U.S. Const., Amend. XIV, § 1; F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 652 (1982 ed.) ("Tax exemptions are not a valid basis to deny rights or benefits to individual Indians."). Petitioners should have issued license plates and registration stickers to tribal members for administrative costs alone, without imposing state taxes as a precondition. This is the State's policy when licensing and registering vehicles owned by Indian tribes. S.D Codified Laws Ann. § 32-5-42.

[13] Even had the Tribe wanted to cede jurisdiction to the State, it could not have done so without congressional authorization. Immunity from state taxation is an aspect of tribal self-government and may be waived only with congressional consent. *Montana v. Blackfeet Tribe*, 471 U.S. at 764-65. Congress has never consented to state taxation of motor vehicles owned by Indians living in Indian country. The only general method Congress has provided whereby states may assume jurisdiction over reservation Indians is Public Law 280, *Washington v. Yakima Nation*, 439 U.S. 463, 470-71 & n.8 (1979), but states may not acquire taxation jurisdiction under Public Law 280, *Bryan*, 426 U.S. at 388.

Oklahoma, like South Dakota, collects its excise tax in lieu of, not in addition to, the state sales tax. Okla. Stat. Tit. 68, § 2106(a) (excise tax levied "in lieu of all other taxes on the transfer or first registration in th[e] state of vehicles," including state sales tax); *compare* S.D. Codified Laws Ann. § 32-5B-1 (excise tax levied "in lieu of" state sales tax). Like South Dakota, Oklahoma has a general sales tax statute, Okla. Stat. Tit. 68, § 1354[14]; *compare* S.D. Codified Laws Ann. § 10-45-1, *et seq.*, and like South Dakota, it exempts motor vehicle sales from the statute's coverage. Okla. Stat. Tit. 68, § 1355(B). Just as in South Dakota, motor vehicles purchased in Oklahoma are subject only to an excise tax. They are not subject to an additional sales tax. Okla. Stat. Tit. 68, § 2106(a); *Peterson v. Oklahoma Tax Comm'n*, 395 P.2d 388, 390, 392 (Okla. 1964) (excise tax, not sales tax, levied on sale of vehicles).[15]

Clearly then, this Court struck down Oklahoma's excise tax in *Sac and Fox* not because it resulted in "a dual imposition," as petitioners suggest, Pet. 23, but because it too closely resembled the taxes struck down in *Colville* and *Moe*.

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[14] This is the additional sales tax which petitioners admit they were unable to locate. Pet. 23 n.16.

[15] Petitioners read far too much into this Court's statement in *Sac and Fox* that Oklahoma's excise tax is "imposed in addition to a sales tax." 508 U.S. at 127. This statement could only mean that Oklahoma's excise tax is separate and distinct from its general sales tax. This Court nowhere suggested that vehicle owners in Oklahoma were required to pay both an excise tax and a sales tax. Oklahoma's excise tax statute and its general sales tax statute, both of which were before this Court in *Sac and Fox*, are clear: motor vehicles purchased in Oklahoma are subject to the excise tax, not the sales tax. Okla. Stat. Tit. 68, §§ 1355, 2106.

Finally, petitioners argue that *Sac and Fox* can be distinguished because, in that case, it was the manner in which Oklahoma collected its excise tax from Sac and Fox members, as opposed to the nature of the tax itself, that "compelled" this Court to conclude that the excise tax was an unlawful property tax. Pet. 23. This is nonsense.

In *Sac and Fox*, Oklahoma assessed its excise tax against all tribal members who owned motor vehicles and operated them in the state. 508 U.S. 119-20. Tribal members who registered their vehicles with the Sac and Fox Nation and, thus, did not pay the state excise were considered "to be delinquent with regard to the state taxes." *Id.* The State did not attempt to collect the taxes from tribal members until they sold their vehicles to non-members, *id.* at 120, but this fact was irrelevant in this Court's eyes. (The State eventually collected the "delinquent excise taxes," *id.*, from non-member purchasers.) What mattered to this Court was that the excise tax was assessed for periods when vehicles were owned by tribal members living in Indian country. *Id.* This, the Court would not permit.

Petitioners ignore this Court's clear rule that states may not impose property taxes on tribal members living in Indian country, no matter when or how they attempt to collect those taxes.

II. Petitioners' Sales Tax Argument Is A Thinly-Veiled Attempt To Circumvent Established Precedent.

South Dakota recognizes that it is a "bedrock Indian law preemption principle[]" that "congressional consent is necessary before the legal incidence of a tax may be imposed on a Tribe or its members as to transactions occurring on Indian Country set aside for their benefit." *Amicus* Brief of

South Dakota, *et al.*, *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (No. 94-771) (1995). In an effort to circumvent this "bedrock principle," petitioners argue that the State's motor vehicle excise tax functions like a sales tax and, accordingly, it may be applied to off-reservation vehicle purchases by tribal members. Pet. 16, 28. This is a veiled plea for this Court to rewrite the state tax laws to transform an unlawful excise tax into a sales tax.

In *Sac and Fox*, this Court rejected an identical plea with respect to an identical motor vehicle excise tax. 508 U.S. at 126. There, the Oklahoma Tax Commission argued that Oklahoma's excise tax "closely resemble[d] a sales tax," and, as such, could be imposed on "the purchase of a car by an Indian" outside Indian country. Brief on the Merits by Petitioner, *Sac and Fox*, 508 U.S. 114 (S.Ct. No. 92-259) at 21. The Tenth Circuit Court of Appeals had rejected this argument, finding it to be a transparent "attempt to circumvent established precedent." *Sac and Fox Nation v. Oklahoma Tax Comm'n*, 967 F.2d 1425, 1430 (10th Cir. 1992). This Court agreed, ruling that the excise tax was not a sales tax since it "'is not enforced as a sales tax against Sac and Fox purchasers,' and by its terms is imposed on both the transfer and use of any vehicle in the State." 508 U.S. at 126, *quoting Sac and Fox Nation*, 967 F.2d at 1430.

South Dakota's excise tax is identical in all relevant respects to Oklahoma excise tax struck down in *Sac and Fox*. Just as it did in *Sac and Fox*, this Court should reject the State's characterization of its excise tax as a sales tax.

A. South Dakota's Excise Tax Is Not A Sales Tax.

The plain language of South Dakota's motor vehicle excise tax statute is clear: the excise tax is not a sales tax,

but rather a levy "*in lieu of*" a sales tax. S.D. Codified Laws Ann. § 32-5B-1 (emphasis added).[16]

The excise tax does not operate like a tax on motor vehicle sales transactions in the state. It is not assessed against all persons who purchase motor vehicles in the state, but only against state residents who register their vehicles in the state, S.D. Codified Laws Ann. § 32-5B-1; or who apply for state vehicle titles, *id.* at § 32-5B-14. Non-residents who purchase vehicles in the state do not pay the tax. Neither do residents who purchase vehicles in the state, but do not register them or apply for title. Conversely, the excise tax does apply to "vehicles purchased by South Dakota residents outside of the state and to certain vehicles not recently purchased, but recently brought into the state." App. 11. The tax also applies to transfers and acquisitions of motor vehicles other than sales.[17]

The taxable event of the excise tax is not the purchase or sale of a vehicle in the state, but rather the ownership of a vehicle by a state resident (whether the vehicle is acquired by purchase, gift, other transfer, or manufacture) and registration of the vehicle or application for title by the resident.

Despite the *post hoc* rationalizations of its advocates,

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[16] "In lieu of" means "instead of" or "in place of," BLACK'S LAW DICTIONARY 787 (6th ed. 1990), not "the same as," as petitioners seem to argue.

[17] For example, vehicles "acquired by gift or other transfer for no or nominal consideration" are subject to the tax. S.D. Codified Laws Ann. § 32-5B-4(4). A motor vehicle "manufactured by the same person who registers it" is also subject to the tax. *Id.* at § 32-5B-4(5).

South Dakota has never treated its motor vehicle excise tax like a sales tax. If it had, it would have granted an exemption to tribal members who purchase their vehicles on the reservation. Indeed, the State readily concedes that it may not tax on-reservation vehicle sales to tribal members, *See* Pet. 28; S.D. Codified Laws Ann. § 10-12A-1, *et seq*, yet it has never granted an exemption for such sales transactions. Similarly, had the State treated the excise tax like a sales tax, it would have included the tax in its comprehensive sales tax collection agreement with the Cheyenne River Sioux Tribe.[18] No motor vehicle tax has ever been included in that agreement.

B. South Dakota's Excise Tax Is Not A "Combined" Sales And Use Tax.

Petitioners *concede* that South Dakota's excise tax does not function like a sales tax. *See*, *e.g.*, Pet. 25-28. To overcome the obstacle this concession poses for their sales tax argument, they characterize the tax as a "sales and use tax combined in one statute." Pet. 28. Through this self-serving definition of the state statute, petitioners argue that the excise tax possesses a use tax component and a separate sales tax component which may be imposed on off-reservation vehicle sales to tribal members. *Id.* at 28. This is nonsense.

The excise tax is not a combined sales and use tax, but rather a one-time "tax on the ownership of a motor vehicle" by state residents. App. 13. It is no different than the excise tax struck down in *Sac and Fox*, App. at 12-13,

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[18] Under this agreement, in place since 1976, the State collects all state and tribal sales taxes from Indians and non-Indians on the reservation and remits a percentage to the Tribe. C.R.S.T. App. No. 34 at 4.

and, accordingly, it may not be imposed on tribal members living in Indian country.

While it is true that the excise tax may bring about the same result as a sales tax in some circumstances, "such as when a new or used car is purchased from a licensed dealer in South Dakota and registered there by the new owner," App. 10, this alone does not transform the excise tax into a sales tax or a combined sales and use tax. Similarly, although the excise tax may resemble a use tax in some instances, this does not mean that it is in fact a use tax, in whole or in part. Many distinct taxes yield common results under certain circumstances.[19]

Indeed, no authority exists to support petitioners' argument that a supposed "combined" tax which coincidentally resembles a sales tax in a few, but not all, applications, should be treated as if it were, in fact, a sales tax when determining the tax immunity of Indian tribal members. This Court refused to reach such a result when confronted with an identical motor vehicle excise tax in *Sac and Fox*.

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[19] The fact that different taxes may, in certain circumstances, bring about the same result does not mean that the taxes are the same. For example, in *McLeod v. J.E. Dilworth*, 322 U.S. 327, 330-31 (1944), this Court stated that although "[a] sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and . . . may have to justify themselves on different constitutional grounds." *Accord Miller Bros. Co. v. State of Maryland*, 347 U.S. 340, 343 (1954) ("[t]axation of sales or purchases and taxation of use or possession are complementary and related," but the taxes are legally distinct and "serve very different purposes"); *State v. Dorhout*, 513 N.W.2d 390, 392-93 (S.D. 1994) (sales taxes and use taxes are distinct assessments on different transactions).

Petitioners ask this Court to rewrite the State's tax laws, transforming its excise tax into distinct and severable sales and use taxes, so that the State may continue to tax Indians who purchase vehicles off the reservation. It is not the business of this or any other federal court to tailor or reformulate state tax laws in order to safeguard state taxation of Indians. *See*, *e.g.*, *Colville*, 447 U.S. at 163-64 (refusing to tailor state excise tax to amount of actual off-reservation use); *Sac and Fox*, 508 U.S. at 127-28 (same). If the State wants to change its tax laws, it is free to do so. "But it has not done so, and [this Court should] decline to treat the case as if it had." *Id.*

III. The Eighth Circuit's Decision Does Not Create A Split Among The Circuits.

Petitioners assert that the Eighth Circuit's decision in this case "squarely conflicts" with *Tunica-Biloxi Tribe v. Louisiana*, 964 F.2d 1536 (5th Cir. 1992). *Tunica-Biloxi* has never been followed by another circuit court and was, in any event, *decided a year before this Court established the prevailing view in* Sac and Fox. Petitioners' attempt to conjure a circuit conflict is, therefore, a little behind the times. The Eighth Circuit's decision follows, and is wholly consistent with, *Sac and Fox*. There is no conflict among the circuit courts over the correct interpretation of *Sac and Fox*.

In any event, the Eighth Circuit's decision and *Tunica-Biloxi* do not "squarely conflict" because the two cases construed fundamentally different tax statutes. In *Tunica-Biloxi*, the Fifth Circuit upheld Louisiana's retail sales tax as applied to off-reservation vehicle sales to a Tribe and its members. 964 F.2d at 1542. Louisiana's retail sales tax is materially different from the South Dakota tax. The taxable event of Louisiana's retail sales tax is "sales transac-

tion" itself, 964 F.2d at 1541, not ownership and registration by state residents, as in South Dakota. Unlike South Dakota's excise tax, Louisiana's retail sales tax applies to vehicles purchased in the state by residents who never register them and it also applies, in many instances, to vehicles purchased by non-residents for use in another state altogether.[20] La. Rev. Stat. § 302.A(1). Unlike the excise tax in South Dakota, Louisiana's retail sales tax does not apply to vehicles purchased in other states or to transfers or acquisitions other than sales.[21]

IV. The Eighth Circuit's Decision Does Not Have National Impact.

In an attempt to alarm this Court, petitioners assert that the decision below "has potential national impact." Pet. 29. Yet, in the same breath, they concede that the decision

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[20] Louisiana exempts certain "property purchased for first use outside the state" from its retail sales tax. La. Rev. Stat. § 305.10(A). Contrary to petitioners' assertions, Pet. 19, this exemption is not a blanket exemption; rather, it applies only under certain circumstances carefully defined by statute, *id.* at § 305.10(B)-(G), and regulation, *see id.* at § 305.10(H).

[21] In order to manufacture a conflict with *Tunica-Biloxi*, petitioners ask this Court to compare South Dakota's excise tax not just to Louisiana's retail sales tax, but also to a state use tax statute that was not before the court in *Tunica*. *See* La. Rev. Stat. § 302.A(2). According to petitioners, "the entire tax schemes of both states should be analyzed." Pet. 16. This makes no sense. Louisiana's use tax was not before the court in *Tunica-Biloxi*, and the Fifth Circuit expressly declined to treat the State's sales and use taxes as a single, combined tax. 964 F.2d at 1540-41. Instead, the court noted that the State's sales and use taxes were distinct and that different legal consequences attached to each. *Id.* The court upheld the retail sales tax, but suggested that a different result might obtain with respect to the use tax. 964 F.2d at 1540-41.

could impact only the "practices of every [other] state in the . . . Circuit." *Id.* That, of course, is true of every decision of a circuit court and hardly constitutes the level of national importance necessary to invoke this Court's jurisdiction. The effect of the decision below on other states in the Eighth Circuit is an issue for the Eighth Circuit to decide, which it did by ruling against petitioners and denying their request for rehearing *en banc*.

At any rate, the decision below will not, in fact, adversely impact the other states in the Eighth Circuit. Petitioners' assumption that these states have motor vehicle tax statutes that "function the same as in South Dakota," Pet. 29, is not well-founded.[22] Moreover, it is not clear that any state in the circuit, other than South Dakota, taxes vehicles owned by Indians living in Indian country.[23]

CONCLUSION

The petition for writ of certiorari should be denied.

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[22] The tax practices of these states were not before the courts below, but it appears that, unlike South Dakota, some of these states have separate statutes that impose distinct sales and use taxes on motor vehicles. *See, e.g.*, Iowa Code Ann. §§ 422.43 (sales tax), 432.7 (use tax); Ark. Code Ann. §§ 26-52-301 (gross receipts tax), 26-53-106 (use tax); Neb. Rev. Stat. §§ 2703(1)(i) (sales tax), 2703(2) (use tax); Mo. Rev. Stat. §§ 144.070 (sales tax), 144.440 (use tax).

[23] For example, Minnesota recognizes tribally-issued license plates and, thus, does not require tribal members to register their vehicles with the state or pay state motor vehicle taxes. *See Red Lake Band of Chippewa Indians v. Minnesota*, 248 N.W.2d 722 (Minn. 1976).

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No. 97-276

In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF SOUTH DAKOTA ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the State of South Dakota and its subdivisions may impose an excise tax upon motor vehicles owned by members of the Cheyenne River Sioux Tribe who reside on the Cheyenne River Reservation.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-30) is reported at 105 F.3d 1552. The memorandum opinion and order of the district court (Pet. App. 31-43) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1997. Pet. App. 2. A petition for rehearing was denied on May 13, 1997. Pet. App. 49-50. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Great Sioux Reservation was established on April 29, 1868 by the Treaty of Fort Laramie, 15 Stat. 635, for the use and occupancy of the Sioux Nation. By the Act of March 2, 1889, ch. 405, 25 Stat. 888, Congress created the Cheyenne River Indian Reservation as a separate reservation, consisting of approximately 4,320 square miles, for the use and occupancy by the Cheyenne River Sioux Tribe, which is a federally-recognized tribe. See *South Dakota* v. *Bourland*, 508 U.S. 679 (1993). In 1908, Congress opened a large portion of the Reservation to non-Indian settlement. That opening, however, did not disestablish the Reservation. See *Solem* v. *Bartlett*, 465 U.S. 463 (1984). The Cheyenne River Indian Reservation wholly encompasses two South Dakota counties, Dewey and Ziebach.

2. Since at least 1986, the State of South Dakota has levied an excise tax on all motor vehicles owned by members of the Cheyenne River Sioux Tribe residing on the Cheyenne River Indian Reservation. The excise tax is imposed:

> at the rate of three percent on the purchase price of any motor vehicle * * * purchased or acquired for use on the streets and highways of this state and required to be registered under the laws of this state. This tax shall be in lieu of any tax levied by chapters 10-45 and 10-46 on the sales of such vehicles. Failure to pay the full amount of excise tax is a Class 1 misdemeanor.

S.D. Codified Laws Ann. § 32-5B-1 (1989).

Until enjoined by the federal courts from doing so, the State required all tribal members residing on

their reservations in South Dakota to have South Dakota license plates when they operated their vehicles off-reservation. Payment of the excise tax was required before the lawful registration of motor vehicles in South Dakota, issuance of South Dakota license plates, and issuance of a certificate of title.[1] Because the excise tax is collected by the county in which the vehicle owner resides, in the case of the Cheyenne River Sioux Tribe, the tax was collected from Indians residing on the Reservation and was enforceable by criminal penalties.

S.D. Codified Laws Ann. § 22-6-2 (1988 & Supp. 1997). State law provides for issuance of state license plates to certain entities, including Indian Tribes that own vehicles, without payment of the excise tax. See S.D. Codified Laws Ann. § 32-5-42 (1989). For individual Indians, however, the State provided no exemption from the tax for any reason. The State required payment of the excise tax by all tribal members owning vehicles and residing on reservations, without regard to the site of purchase and notwithstanding that there are retail car dealerships located on the Cheyenne River Indian Reservation. New residents of the State are required to pay the excise tax irrespective of when they purchased the car or whether that purchase was made outside the State.

Tribal law enacted by the Tribal Council in 1987 required that motor vehicles operated on the Reservation "bear valid South Dakota motor vehicle li-

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[1] The State also requires payment of a registration and licensing fee as a prerequisite to issuance of license plates. S.D. Codified Laws Ann. § 32-5-5 (1989 & Supp. 1997) (reproduced at note 4, *infra*).

cense plates." Pet. App. 55. That resolution by the Cheyenne River Tribal Council did not, however, require payment of state motor vehicle taxes.[2] To the contrary, the Tribal Council "consistently protested the imposition of state motor vehicle taxes on its members" as a condition of receiving state license plates. *Id.* at 19.

3. On September 3, 1992, the United States filed this action on behalf of the Cheyenne River Sioux Tribe and its members to challenge the validity of the State's levy of the excise tax on motor vehicles owned by members of the Tribe residing on the Cheyenne River Indian Reservation.[3] The United States also challenged the State's assessment of a registration and licensing fee pursuant to S.D. Codified Laws Ann. § 32-5-5 (1989 & Supp. 1997) on the vehicles owned by tribal members residing on the Reservation.[4] The

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[2] Contrary to the State's assertion (Pet. 2, 11), the Cheyenne River Sioux Tribe did not thereby require payment of state taxes. As the court of appeals found (Pet. App. 19), the Tribal Council resolutions on which the State relies for that assertion did not address the payment of state motor vehicle taxes or suggest that collection of such taxes from tribal members was valid.

[3] The defendants in this case are the State of South Dakota and Gary Viken, State Secretary of Revenue; Dewey County, South Dakota, and John Alley, County Treasurer; and Ziebach County, South Dakota, and Virginia Hertel, County Treasurer.

[4] The statute imposing a registration fee, S.D. Codified Laws Ann. § 32-5-5 (1989 & Supp. 1997), provides:

> **Registration fee based on weight - Certification of correct weight.** Subject to the provisions of §§ 32-5-17 to 32-5-45, inclusive, license fees and compensation for use of the highways, fees shall be based, except as otherwise specifically provided, upon manufacturers' weights, including accessories. If the department determines the

Cheyenne River Sioux Tribe intervened as a plaintiff. The parties filed cross motions for summary judgment on the validity of the excise tax and the registration fee.

On February 21, 1995, the district court held that the State could not require Cheyenne River Sioux tribal members residing on their Reservation to pay the excise tax as a condition for obtaining state license plates, because in those circumstances the excise tax impermissibly taxed Indians in Indian country. Pet. App. 35-36. The court concluded that the excise tax is "essentially the same type of [motor vehicle excise] tax" on reservation Indians that was prohibited by this Court's decisions in *Oklahoma Tax Commission* v. *Sac and Fox Nation*, 508 U.S. 114 (1993), and *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). Pet. App. 36. The district court held that the excise tax is not a "sales tax," explaining that it is not assessed against all persons purchasing a motor vehicle in South Dakota, but rather is assessed whenever an owner seeks to obtain a South Dakota motor vehicle title. *Ibid.*

The district court ruled against the United States and Tribe on other issues. It held that the registra-

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actual dry weight of any model vehicle with accessories to be at variance with the manufacturers' weight, the department shall certify the correct weight to be used in determining fees.

These fees shall be paid annually to the county treasurer, and shall be as provided by §§ 32-5-6 to 32-5-16, inclusive.

The fees vary, and are imposed every year at the time the owner obtains license plates or renewal tags. S.D. Codified Laws Ann. § 32-5-6 (1989 & Supp. 1997).

tion and licensing fee could be assessed against tribal members who reside on the Reservation. Although the parties had not addressed remedial issues, the district court, *sua sponte*, decided those issues. With respect to the excise tax claim, on which the United States and Tribe had prevailed, the district court granted only declaratory relief, declining to allow recovery of excise taxes unlawfully collected from tribal members since 1986. The court reasoned that to allow such recovery would be an improper retroactive application of law.

4. With one judge dissenting in part, the court of appeals affirmed in part, and reversed and remanded in part.[5] The court held that the motor vehicle excise tax may not be imposed on tribal members residing on the Reservation because it "essentially operates as a tax on the ownership of a motor vehicle" and "the ownership of a vehicle is the sort of on-reservation activity that a state is not permitted to tax without express Congressional authorization." Pet. App. 13. In so concluding, the court rejected for a number of reasons the State's alternative argument that the excise tax is a sales tax on non-reservation transactions and, therefore, permissibly levied on off-reservation sales.[6] First, the court explained that the

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[5] On appeal, the United States' suit on behalf of the Cheyenne River Sioux Tribe was consolidated with a suit brought by the Rosebud Sioux Indian Tribe seeking to enjoin collection of the excise tax and registration fee from Indians residing on the Rosebud Sioux Reservation.

[6] In the courts below, the State principally argued that the excise tax was a "user fee" that could permissibly be levied on all vehicles owned by tribal members and driven off-reservation. The State alternatively contended that the excise tax is a "sales" tax. A sales tax could not be levied on vehicles that

statute itself speaks of levying an excise tax "in lieu of" any sales or use tax on the value of any motor vehicle "purchased or acquired for use" in the State. *Id.* at 9 (quoting S.D. Codified Laws Ann. § 32-5B-1 (1989)). Second, unlike the state sales tax, the excise tax is not imposed on the retailer or at the time of sale. *Ibid.* Third, the amount of the tax may be determined either by the actual consideration paid or by the actual value of the vehicle. *Id.* at 10. Fourth, although the excise tax might resemble a tax on a sales transaction in some instances, it does not in other circumstances. *Ibid.* For example, the "tax does not apply to all motor vehicle sales in the state, but only to those resulting in ownership by a South Dakota resident." *Id.* at 10-11. Also, unlike a sales tax, the excise tax applies to vehicles purchased by state residents outside of the State and to certain vehicles not recently purchased, but recently brought into the State. *Id.* at 9 n.8, 10-11. For those reasons, the court concluded that "the tax more obviously relates to the ownership of the vehicle as property rather than the sales transaction itself." *Id.* at 10.

In holding that the tax may not be lawfully assessed, the court distinguished *Tunica-Biloxi Tribe* v. *Louisiana*, 964 F.2d 1536 (5th Cir. 1992), explaining that the South Dakota excise tax differs from the retail sales tax upheld in *Tunica-Biloxi Tribe*. Pet. App. 10-11. The court therefore rejected the dissent's contention that it had created an inter-circuit conflict with the Fifth Circuit. The court pointed out as well that the Fifth Circuit "did not have the benefit of" (Pet. App. 12 n.10) this Court's intervening decision

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tribal members purchased or acquired on-reservation. See *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 475-481 (1976).

in *Oklahoma Tax Commission* v. *Sac and Fox Nation*, 508 U.S. 114 (1993), which was decided one year after *Tunica-Biloxi Tribe*.

The court of appeals also affirmed the district court's holding that the registration and licensing fee may lawfully be imposed on tribal members. The court reversed, however, the district court's denial of monetary relief to compensate for past payments of the excise tax by tribal members, holding that the district court's rationale for denying such relief was unsound. Pet. App. 17-20. The court therefore remanded for further development of the record and the refund issue and for a new ruling on whether monetary relief for wrongful collection of the excise tax is appropriate. *Id.* at 20.

Judge Ross dissented in part. Pet. App. 23-30. He concurred "in the majority opinion to the extent that it concludes the State of South Dakota has the authority to impose an annual motor vehicle registration fee on Native Americans who live within the boundaries of a reservation." *Id.* at 23. Judge Ross was of the view, however, that the excise tax is a "sales tax levied on the sale of motor vehicles, and as such is a valid state tax on a non-reservation transaction." *Id.* at 23, 26-27. *Id.* at 23, 26-27.

ARGUMENT

Petitioner argues that the courts below erred in invalidating the state motor vehicle excise tax as an impermissible tax levied against tribal members residing on an Indian reservation. The court of appeals' decision on that issue is correct and does not conflict with any decision of this Court or any other court of appeals. Further review, therefore, is not warranted.

1. In the special area of state taxation of Indian Tribes and tribal members, this Court has established a per se rule that, absent congressional authorization, a State may not tax Indian Tribes or the property or activities of individual Indians within Indian Country. *E.g.*, *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450 (1995); *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987). This Court has applied that rule to taxes on motor vehicles in a trilogy of cases: *Oklahoma Tax Comm'n* v. *Sac and Fox Nation*, 508 U.S. 114 (1993); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); and *Moe* v. *Salish and Kootenai Tribes*, 425 U.S. 463 (1976). *Moe* invalidated a state property tax imposed on motor vehicles owned by tribal members residing on a reservation. *Colville* invalidated excise taxes, assessed on the basis of a vehicle's market value, which the state statute characterized as taxing the use in the State of motor vehicles, mobile homes, campers, and travel trailers. 447 U.S. at 143, 162. *Sac and Fox Nation* likewise invalidated a state excise tax as well as a registration fee on motor vehicles. In the latter two cases, this Court rejected arguments by the respective States that their excise taxes were permissible because they only taxed use of a vehicle outside Indian country. The Court explained that the tax schemes were fatally flawed for failing to apportion the amount of the tax to the amount of actual use outside Indian country. *Colville*, 447 U.S. at 163-164; *Sac and Fox Nation*, 508 U.S. at 128.

Significantly, the tax struck down in *Sac and Fox Nation* was an excise tax with characteristics closely analogous to the South Dakota tax at issue here—a one-time tax based on the value of vehicles that are

owned by tribal members and are used both inside and outside Indian country. In *Sac and Fox Nation*, this Court rejected the State's contention that the tax was valid because it "resemble[d] a sales tax," observing that, by its terms, the excise tax is imposed on "both the transfer and the use of any vehicle." 508 U.S. at 126. The Court therefore concluded that the excise tax was sufficiently similar to the excise and property taxes held preempted in *Colville* and *Moe* that the same result should obtain. *Id.* at 127.

Petitioner asserts (Pet. 22) that this Court's statement in *Sac and Fox Nation* that "the excise tax and registration fee are imposed in addition to a sales tax," 508 U.S. at 127, means that the decision turned on the fact that vehicle owners in Oklahoma were required to pay both an excise tax and a sales tax. Petitioner acknowledges, however, that it is unable to find any support in the Oklahoma statutes for that interpretation. See Pet. 23 n.16; see generally Okla. Stat. Ann. tit. 68, § 2106 (West 1992) (motor vehicle excise tax is "in lieu of all other taxes," including general sales tax, with exception of registration fee); *id.* § 1355 (West 1992 & Supp. 1997) (sale of motor vehicles is exempted from sales tax where "the Oklahoma Motor Vehicle Excise Tax * * * has been, or will be paid").

Indeed, South Dakota's excise tax reads exactly like the Oklahoma excise tax held invalid in *Sac and Fox Nation*. South Dakota has a general sales tax statute, S.D. Codified Laws Ann. § 10-45 (1996 & Supp. 1997), but that tax need not be paid on sales of motor vehicles; rather, like Oklahoma, South Dakota imposes an excise tax on motor vehicles "in lieu of" that general sales tax. S.D. Codified Laws Ann. § 32-5B-1 (1989). Moreover, South Dakota, like Oklahoma, does

not limit the excise tax to purchases, as would ordinarily be the case with a sales tax. Non-sale transfers of title and first registrations in the State are subject to the excise tax in both States.[7]

Petitioner further contends (Pet. 23-24) that the holding in *Sac and Fox Nation* turned on unique facts related to the manner of collection—allegedly discriminatory treatment by the Oklahoma Tax Commission in requiring purchasers of vehicles from tribal members to pay the excise tax that had not been collected from the tribal members, as contrasted with purchasers of vehicles from non-Indians who did not have to pay the excise tax because the tax had already been paid by the former owner. Petitioner argues (Pet. 24) that because it collected the excise tax directly from tribal members, it did not discriminate against those members in the way that Oklahoma had. Nothing in this Court's decision in *Sac and Fox Nation* supports petitioner's suggestion that the outcome turned on Oklahoma's method of tax collec-

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[7] Petitioner also argues (Pet. 22) that its excise tax is materially different because South Dakota dedicates revenues to highway purposes whereas revenue from Oklahoma's tax funded general governmental functions. That distinction, however, provides no reason to treat South Dakota's excise tax as a sales tax. The dedication for highway purposes cannot serve to make its exaction against tribal members permissible. See *California* v. *Buzard*, 382 U.S. 386, 394 n.8, 395 (1966) (State could not require United States service members to pay registration fee on motor vehicles even though revenues were dedicated to highway purposes because fee served primarily a revenue interest, "narrower in purpose but no different in kind from taxes raised to defray the general expenses of government"); cf. *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 173 n.12 (1973) (State's conferral of benefits on reservation Indians does not affect Indians' tax-exempt status).

tion. Moreover, the discussion in the court of appeals' decision in *Sac and Fox Nation*, on which South Dakota relies for this theory (Pet. 24), addressed the question whether the excise tax was a tax on tribal members, rather than on non-Indian purchasers. *Sac and Fox Nation* v. *Oklahoma Tax Comm'n*, 967 F.2d 1425, 1430 (10th Cir. 1992). In other words, Oklahoma's collection practice was relevant to whether the incidence of the tax in fact fell on tribal members and their property, but that question is not posed here because South Dakota's excise tax concededly falls on tribal members.

2. Petitioner contends (Pet. 16-21) that the court of appeals' decision conflicts with the holding in *Tunica-Biloxi Tribe* v. *Louisiana*, 964 F.2d 1536 (5th Cir. 1992), a decision rendered before *Sac and Fox Nation*. Petitioner bases its assertion of a conflict on the contention (Pet. 19) that the South Dakota excise tax yields the same results as the Louisiana tax scheme upheld in *Tunica-Biloxi Tribe*. As the court below concluded, that contention is incorrect.

a. The statute at issue in *Tunica-Biloxi Tribe* was the general retail sales tax that Louisiana imposes on all retail, in-state purchases of goods, including motor vehicles. La. Rev. Stat. Ann. § 47:302.A(1) (West 1990). The Fifth Circuit held that a tribal government could be required to pay the retail sales tax when it purchased a new motor vehicle from a car dealership located off-reservation, because the taxable event occurred there. 964 F.2d at 1540-1541. The Tunica-Biloxi Tribe court stated: "[I]n the sales tax context, the ultimate destination of the property is not crucial, as the sales transaction—the taxable event—provides the nexus with the state." *Id.* at 1541.

Unlike the Louisiana sales tax at issue in *Tunica-Biloxi Tribe*, South Dakota's excise tax is not denominated as a sales tax and does not operate as one. Under the South Dakota statute, the taxable event is transfer of title to a state resident and use in the State. "It has long been recognized that 'use' is among the 'bundle of privileges that make up property or ownership' of property and, in this sense at least, a tax upon 'use' is a tax upon the property itself." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 158 (1973). The South Dakota excise tax by its terms is a tax on the ownership and use of vehicles and, therefore, is a tax upon the property itself.

Petitioner's characterization of its excise tax as a sales tax first appeared in this litigation and is contrary to the State's prior characterization and enforcement of the tax. For example, the State has never allowed tribal members any exemption from payment of the excise tax for vehicles acquired on-reservation or out-of-state, despite its recognition that a State legally may not impose a sales tax for on-reservation purchases by tribal members.[8]

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[8] The statement in the dissent below that "[i]t is clear that all of the sales occur outside the reservation," Pet. App. 24, is unsupported by any record citation. We are informed that there are retail car dealerships located on the Cheyenne River Reservation as well as other reservations in South Dakota; furthermore, used cars are undoubtedly purchased from private persons on-reservation. Had the State regarded the excise tax as a "sales" tax, it would, by its theory, have been obliged to exempt on-reservation sales. It had not done so precisely because the excise tax is not a sales tax and had not been regarded as one by the State.

Under a cooperative agreement, the State collects all state and tribal sales taxes and remits to the Tribe a percentage of the revenues, in recognition of the fact that purchases by

b. Petitioner's claim that its excise tax operates exactly the same as the tax upheld in *Tunica-Biloxi Tribe* is based on an inapt comparison of the practical revenue results of its excise tax with Louisiana's overall scheme for taxing non-Indian-owned motor vehicles. South Dakota asserts that because, in a statutory provision separate from the general retail sales tax, Louisiana imposes a "use tax" on motor vehicles and other goods purchased out-of-state and later brought into the State for use, see La. Rev. Stat. Ann. § 47:302.A(2) (West 1990), the Louisiana tax scheme as a whole yields the same revenue as South Dakota's excise tax. Even if that were true, it is irrelevant. The Fifth Circuit addressed only the question whether a general retail sales tax provision could permissibly be applied to an off-reservation purchase by an Indian Tribe.[9] The Fifth Circuit indicated that the same result might not obtain for the separate statute imposing a use tax. See 964 F.2d at 1540-1541. *Tunica-Biloxi Tribe* did not address the validity of a tax, like South Dakota's excise tax, that is not denominated a sales tax, is broader in scope than the Louisiana sales tax, and fails to make the distinction drawn by the State between a sales and a use tax.

Indians within Indian country are exempt from state taxation. However, the State refused the Tribe's proposals to have a similar arrangement for motor vehicle excise taxes. Tribe's C.A. App., Tab 34.

[9] Louisiana's sale tax is assessed on the sales price of items sold. *Tunica-Biloxi Tribe*, 964 F.2d at 1540. South Dakota taxes the "value" of vehicles and in that way subjects transfers by gift, with certain exceptions (see S.D. Codified Laws Ann. § 32-5B-2(3) and (4) (1989 & Supp. 1997)), to the tax. See S.D. Codified Laws Ann. §§ 32-5B-1, 32-5B-4 (1989).

South Dakota has a general retail sales tax statute like the statute at issue in *Tunica-Biloxi Tribe*. However, South Dakota's sales tax statute, S.D. Codified Laws Ann. § 10-45 (1996 & Supp. 1997), is not at issue here because it is not applicable to motor vehicles. The court below thus correctly concluded that "[s]ince the characteristics of the South Dakota tax differ from the Louisiana tax, the outcome here is not inconsistent with Tunica." Pet. App. 11.

c. This Court has rejected the notion implicit in South Dakota's argument (Pet. 19-20) that a resemblance between the revenue results of different taxes makes them legally equivalent. See, *e.g.*, *McLeod* v. *J.E. Dilworth Co.*, 322 U.S. 327, 331 (1944) ("Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and for different opportunities afforded by a State."); accord *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 343 (1954).[10] Thus, the legal underpinnings and validity of each are distinct. *McLeod*, 322 U.S. at 330 ("A sales tax is a tax on the freedom to purchase * * *. A use tax is a tax on the enjoyment of that which was purchased."); *Miller Bros. Co.*, 347 U.S. at 344. Contrary to petitioner's assumption (Pet. 19), the Louisiana and South Dakota taxing schemes are written differently and cannot be equated in terms of their legal validity. Compare *Chickasaw Nation*, 515 U.S. at 457-460. The decision by the court below rests on a reasonable

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[10] See also *State* v. *Dorhout*, 513 N.W.2d 390, 392-393 (S.D. 1994) (sales tax and use tax are distinct assessments on different transactions); *Corbin* v. *Comm'r of Revenue*, 240 N.W.2d 809 (Minn. 1976) (use tax statutes and sales tax statutes are not interchangeable).

interpretation of the South Dakota statute as falling within the category of excise taxes that (unlike the sales tax applied off-reservation in *Tunica*) a State may not impose. There is no reason for this Court to disturb that ruling. See *Chickasaw Nation*, 515 U.S. at 461-462.

3. Petitioner argues (Pet. 29) that the court of appeals' decision has impact beyond South Dakota because South Dakota's tax scheme functions the same as that of other States within the Eighth Circuit. As support for that contention, petitioner relies solely on assertions made in the dissent regarding information not contained in the record in this case. If the dissent is correct, although there is reason to think it is not,[11] it would be appropriate for this Court to allow further percolation of the issue in the lower courts. If the issue is as significant as petitioner asserts, it will recur and the Court will have the benefit of decisions from the Eighth Circuit as to other state statutes and from other circuits. Because the decision below is the first to address the issue after *Sac and Fox Nation*, and because it is correct, review is not warranted in this case.

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[11] Compare Pet. App. 25-26 with *Red Lake Band of Chippewa Indians* v. *Minnesota*, 248 N.W.2d 722 (Minn. 1976) (recognizing validity of Indian Tribes' issuance of tribal license plates, which obviates the need for state registration of motor vehicles) and Minn. Stat. Ann. § 270.60 (West 1989 & Supp. 1997) (authorizing agreements between Tribes and State regarding refunds of taxes collected from tribal members, including motor vehicle excise taxes).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1997

STATE OF SOUTH DAKOTA;
GARY VIKEN, Secretary of Revenue;

Petitioners,

v.

UNITED STATES OF AMERICA, on behalf of the Cheyenne River Sioux Tribe and its members,

and

CHEYENNE RIVER SIOUX TRIBE,

and

DEWEY COUNTY, South Dakota; JOHN ALLEY, County Treasurer; ZIEBACH COUNTY, South Dakota; VIRGINIA HERTEL, County Treasurer,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

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PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

The majority panel mischaracterized South Dakota's one-time three percent excise tax on motor vehicles, SDCL 32-5B-1, as a "personal property tax" in order to reach the result that the tax could not be imposed upon CRST members residing within their reservation. This decision conflicts with *Tunica-Biloxi Tribe v. Louisiana*, 964 F.2d 1536 (5th Cir. 1992), where a motor vehicle sales tax functionally identical to SDCL 32-5B-1 was validated as to "off-reservation sales to Indians." Further, the majority below concluded (incorrectly) that *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993), overruled *Tunica*, when, in reality, *Sac and Fox* is distinguishable and should be limited to its own unique facts. Finally, the majority confused and commingled the principles of sales taxes and use taxes to reach their erroneous conclusions.

Both the CRST and United States briefs in opposition track the majority opinion. However, neither Respondent overcomes the conclusions in the dissent that the majority opinion conflicts with *Tunica* and represents an unwarranted extension of *Sac and Fox* which ought to be reviewed and reversed by this Court.

I. CRST MEMBERS PAID THE TAX AT ISSUE BECAUSE THEY WERE COMPELLED TO DO SO BY TRIBAL (NOT STATE) LAW.

The United States (U.S. Br. 2-4) and the Tribe (CRST Br. 3-5, 7, 16-17) insist that the State compelled CRST members to purchase South Dakota license plates and pay the South Dakota motor vehicle excise tax (SDCL 32-5B-1) through criminal sanctions. These assertions are simply inaccurate. In fact, since *Solem v. Bartlett*, 465 U.S. 463 (1984), the State has been precluded from enforcing state criminal laws (including motor vehicle licensing statutes) against Indians within the Cheyenne River Reservation. Despite the outcome of this litigation, the State

will be unable to enforce its motor vehicle licensing statutes within Indian country. Consequently, CRST members have been, since 1984, free to own and operate motor vehicles on the CRST reservation without complying with SDCL 32-5B-1, unless forced to comply by the Tribe.

The reality is that on January 14, 1987, the CRST incorporated "those provisions of the South Dakota Traffic Code Dealing with vehicle Licensing and Driver's License" into the CRST Law and Order Code. App. 51-2. In 1990, the CRST Council directed tribal law enforcement to cite motor vehicle operators driving without valid license plates into tribal court. App 54-5. The majority (App. 19) and the Respondents suggest that because neither of the above tribal enactments mentioned SDCL 32-5B-1 specifically, the CRST was not forcing their members to pay the excise tax. The problem with that argument is, of course, that no one explained that nice distinction to CRST law enforcement or the CRST membership. The CRST police department regularly issued traffic citations, levied fines, and impounded motor vehicles of CRST members without current South Dakota license plates from 1987 until March 8, 1994. Marvin LeCompte, CRST chief of police, at a deposition on March 8, 1994, was asked the following questions, and gave the following answers:

Q Are you aware of any instances where tribal police officers you supervise would have stopped vehicles for not having valid tags on their motor vehicle license plates?
A Yes.
Q Was that a common practice?
A Yes, it is.
Q For both Indians and non-Indians?
A Yes.
Q I believe you have already testified that the Indians were not cited into state court; is that correct?

A Yes.
Q Where were they cited to?
A Tribal court.
Q What were they cited for?
A Substitute plates.
Q Substitute plates?
A Not substitute plates, no valid license tags.
Q What was done in tribal court with those individuals, if you followed through on this?

. . . . (Objection omitted.)

Q Do you know what the normal penalty was?
A Oh, penalty for invalid tags?
Q Yes.
A I'm not sure. I believe it was fine of $25.
Q Were these individuals allowed to drive off with the vehicle that did not have valid tags?

. . . . (Objection omitted.)

A They were allowed to drive the vehicle off only if they showed valid tags.
Q If they were not able to show valid tags, what was done with the vehicle?
A The vehicle left impounded or left up to the judge to decide whether or not they . . .
Q Is the tribal police department still following that policy?

. . . . (Objection omitted.)

A As of today, yes.

CRST Eighth Circuit Court of Appeals Appendix, Volume 1, Exhibit 29, p. 28-30.

Relying on the argument above, both the Tribe (CRST Br. 21-22) and the United States (U.S. Br. 13-14), assert that South Dakota has never treated SDCL 32-5B-1 like a sales tax. They argue that the State should have exempted

motor vehicle purchases by CRST members at auto dealerships which they claim exist on the reservation. The argument is flawed for at least three reasons. *First*, those transactions are already exempt because the State has not, since 1984, enforced SDCL 32-5B-1 (or any other criminal statute) against Indians within the CRST reservation boundaries. *Second*, the exemption has actually been denied to tribal members because the CRST has forced its membership to buy plates, and to pay the tax by citing them into tribal court and impounding their vehicles. *Third*, South Dakota's excise tax, SDCL 32-5B-1, is typical of sales and use taxes on motor vehicles in all other jurisdictions in the Eighth Circuit. App. 24-6. Both Vermont,[1] and significantly, Louisiana impose sales and use taxes on motor vehicles which are functionally indistinguishable from South Dakota. In fact, in 1994, 46 states and the District of Columbia imposed a sales tax on the sale of motor vehicles.[2]

II. RESPONDENTS MISS THE POINT ABOUT "DEDICATED REVENUES."

Both Respondents (U.S. Br. 11 n.1, CRST Br. 14-16) criticize South Dakota's constitutional dedication of

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[1] *See* discussion of Vermont tax on motor vehicles at Pet. Br. 25-6.

South Dakota, like Vermont, imposes a motor vehicle specific sales and use tax and dedicates the revenue to "maintenance, construction & supervision of highways & bridges of this state." S.D. Const. Art. XI, § 8. Consequently, this constitutional provision requires the State to segregate these dedicated revenues from general fund sales & use tax revenues.

[2] *See* Rayola Dougher, *American Petroleum Institute, the Funding of Roads in the United States: How the Taxes and Fees Collected from Motorists are Spent*, Research Study #088 (May 1997).

motor vehicle excise tax revenues to the improvement of state highways as irrelevant. However, this Court in *Sac and Fox* observed that both Oklahoma taxes at issue raised revenue for "general governmental functions." South Dakota is different. One hundred percent of SDCL 32-5B-1 revenues are dedicated to the state highway fund and spent on roads.[3] Since the taxes at issue in *Moe*[4] and *Colville*[5] also raised "general revenue," South Dakota's tax varies from *Moe, Colville* and *Sac and Fox* in a significant manner "other than mere nomenclature."

This Court may have also had in mind its decision in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In *Bracker*, Arizona attempted to collect a motor carrier gross receipts tax and use fuel tax from a non-Indian contractor working for the tribe within the reservation exclusively on tribal or BIA roads. The contractor paid without protest those taxes which represented the use of state maintained roads within the reservation and challenged only that portion of the taxes which represented use of BIA or tribally maintained reservation roads. This Court held that the federal government had preempted

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[3] According to the American Petroleum Institute, almost all states and the federal government divert tax receipts from motorists to non-road uses:

> In contrast, motorists in Alaska, South Dakota, the District of Columbia, and Oregon are shown to be "subsidized." That is, the taxes and fees collected directly from motorists (exclusive of interest income and bond proceeds) in these states are less than the amounts dedicated to roads.

Dougher, *supra* n. 2, at 18.

[4] *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976).

[5] *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

tribal timber harvesting to such an extent that imposition of these state taxes would impede the federal plan. The Court balanced the competing tribal, federal, and state interests and found that Arizona was "unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation." *Bracker*, 448 U.S. at 148-9. The Court later explained its analysis:

> As noted above, this is not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall. Nor have respondents been able to identify a legitimate regulatory interest served by the taxes they seek to impose. They refer to a general desire to raise revenue, but we are unable to discern a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations conducted solely on tribal and Bureau of Indian Affairs roads. Pinetop's business in Arizona is conducted solely on the Fort Apache Reservation. Though at least the use fuel tax purports to "compensat[e] the state for the use of its highways," Ariz. Rev. Stat. Ann. § 28-1552 (Supp. 1979), no such compensatory purpose is present here. The roads at issue have been built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors. We do not believe that respondents' generalized interest in raising revenue is in this context sufficient to permit its proposed intrusion into the federal regulatory scheme with respect to the harvesting and sale of tribal timber.

Bracker, 448 U.S. at 150. Consequently, if the *Bracker* analysis is applied to the instant case, a different result is mandated. The federal scheme for construction and maintenance of roads on reservations is vested in the state-federal partnership or the Bureau of Indian Affairs, not

the Tribe. The State has a specific interest in collecting the taxes at issue particularly since they are imposed upon those who use reservation roads with the proceeds dedicated to construction and maintenance of those same highways.

III. THE CONFLICT WITH *TUNICA-BILOXI TRIBE* REMAINS.

The United States (U.S. Br. 12-16) adopts the majority "form over substance" analysis that has been repeatedly rejected by this Court in *Moe* and *Colville*. Twice they suggest that the tax at issue is not a sales tax because South Dakota does not call it a "sales tax." They then compare South Dakota's *entire* sales and use tax scheme for motor vehicles to *only* the sales tax portion of *Tunica's* tax scheme. This "apples versus oranges" analysis is inappropriate for all the reasons listed in the dissent. However, a more fundamental criticism of this mixed analysis is that South Dakota has only asked for what *Tunica* allows, that is, the right to impose its motor vehicle excise tax on *off-reservation sales* to CRST members. South Dakota has always conceded its inability to enforce taxation of *on-reservation* sales of motor vehicles to CRST members; and, because the State requested only the relief allowed under *Tunica*, the majority cannot compare sales tax and use tax transactions on one hand, and ignore the use tax on the other. The majority should either compare the entire sales and use tax scheme in South Dakota with the complete Louisiana sales and use tax scheme; or, compare only the sales tax components of the South Dakota statute with *Tunica*. Either way, South Dakota would prevail.

IV. RESPONDENTS HAVE FAILED TO DEMONSTRATE THAT *SAC AND FOX* IS CONTROLLING IN THIS CASE.

Sac and Fox dealt with two Oklahoma motor vehicle taxing statutes. The first was denominated a "registration fee" but was actually an annual assessment of 1¼ percent of market value of the motor vehicle collected at registration. The second was a one-time 3¼ percent "excise tax" which is functionally similar to, but different in application from, South Dakota's SDCL 32-5B-1. *Sac and Fox* is distinguishable from this case in two major respects. *First,* Oklahoma engaged in discriminatory enforcement of their motor vehicle taxes against Sac and Fox purchasers. This Court agreed with the Tenth Circuit Court of Appeals that Oklahoma's excise tax was not a sales tax since it "is not enforced as a sales tax against Sac and Fox purchasers." *Sac and Fox,* 508 U.S. at 126, *quoting Sac and Fox Nation v. Oklahoma Tax Commission,* 967 F.2d 1425, 1430 (10th Cir. 1992).

Second, the most telling variance is imbedded in the following statement:

> Oklahoma's taxes are no different than those in *Moe* and *Colville*. **Like the taxes in both those cases, the excise tax and registration fee are imposed in addition to a sales tax**; the two taxes are imposed for use both on and off Indian country; and the registration fees are assessed annually based on a percentage of the value of the vehicle. (Emphasis added.)

Sac and Fox, 508 U.S. at 127. The highlighted quote appears to be crucial to the *Sac and Fox* result. The dissent reached the obvious conclusion.

> *Sac and Fox* is also distinguishable from the case now before us. The Supreme Court noted as significant several times throughout its discussion that the excise tax at issue in *Sac and Fox* was paid "in addition to the state sales tax,"[19]

> 508 U.S. at 119, 126, 127. Accordingly, the Court rejected the state's argument that the excise tax resembled a sales tax on transactions occurring outside Indian country. *Id.* at 126. Just the opposite is true here, where South Dakota law specifically states that the excise tax "shall be in lieu of any tax levied . . . on the sales of such vehicles." S.D. Codified Laws Ann. § 32-5B-1. Unlike *Sac and Fox*, the South Dakota motor vehicle excise tax is meant to be in lieu of the state's sales tax, not to augment it.
>
> [19]Oklahoma's "sales" tax levied on motor vehicles was not challenged in *Sac and Fox*.

App.28.

The problem is that although both Montana[6] in *Moe*, and Washington[7] in *Colville*, imposed a motor vehicle sales tax in addition to the taxes at issue; Oklahoma did not.[8]

CRST offered an alternate explanation, namely, "This statement could only mean that Oklahoma's excise tax is separate and distinct from its general sales tax." CRST Br. at 18 n.15. The CRST explanation is obviously wrong, because of the necessity that any interpretation must parallel the taxes in Montana during *Moe* and Washington during *Colville*. The CRST explanation does not work. Montana is one of the few states that does not have a general sales tax; Montana does, however, impose a "sales tax" only on motor vehicles.[9] Washington, on the other hand, imposes a "general sales tax" which *includes*

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[6] Mont. Code Ann. § 61-3-502 (1997). The version in effect in 1976 is largely the same. Rev. C. Mont. 32-3315 (1975). *See also* 1975 Mont. Laws Ch. 74, § 15.

[7] Wash. Rev. Code Ann. § 82.08.020 (1993), § 82.12.020 (1996), and § 82.12.045 (1997)

[8] Okla. Stat. Ann. tit. 68, § 1355(2) (West 1995)

[9] *See* n.6 *supra*.

motor vehicles. Neither the Montana or the Washington sales tax on motor vehicles is similar to Oklahoma's.

The United States has not offered an interpretation. Another plausible interpretation is possible in addition to the one adopted by the dissent. The Court may be referring to the multiple impositions of Oklahoma's excise tax on tribal members because "the subsequent owner must bring up the title on the vehicle by paying the current and delinquent excise taxes on the transfers of the vehicle." *Sac and Fox*, 508 U.S. at 120 (*quoting* App. 29). This interpretation is consistent with *Sac and Fox*, and should result in reversal of the majority opinion below, because South Dakota does not engage in such discriminatory application of its tax laws.

CONCLUSION

The case below conflicts with *Tunica-Biloxi Tribe*. *Sac and Fox* is distinguishable and does not control this case, or overrule *Tunica*, or resolve the conflict.

Moreover, the language from *Sac and Fox* suggesting that Oklahoma imposed an excise tax on the transfer of a motor vehicle "in addition to a sales tax" is not clear and will likely cause confusion in the future. This Court should grant review, reverse the lower court and clarify *Sac and Fox*.

Respectfully submitted,

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